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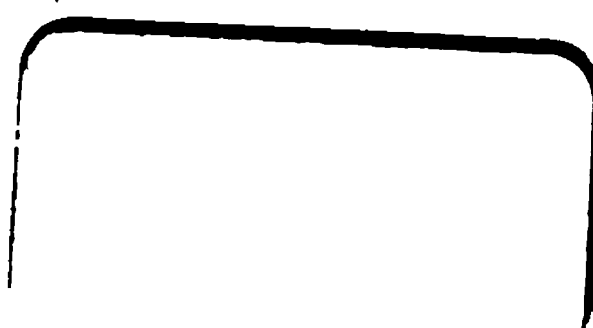
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THE
AMERICAN DECISIONS

CONTAINING THE
CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN
THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1880.

COMPILED AND ANNOTATED
BY A. C. FREEMAN,
COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-SURETY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

Vol. XVII.

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AMERICAN DECISIONS
VOL. XVII.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY

SLAUGHTER v. FROMAN.

[5 T. B. MONROE, 19.]

ADMINISTRATOR DE BONIS NON is entitled to all property of the decedent unadministered, but not to money, the proceeds of property sold by the first administrator.

SURETIES, LIABILITY OF.—Sureties on a joint bond of two persons as administrators, are not liable to one of the administrators for property of the estate converted by the other.

PARTIES.—On the distribution of an estate, all the distributees should be before the court.

ERROR to the Nelson circuit. Bill in chancery. The opinion states the case.

Guthrie, for plaintiff.

By Court, **MILLS, J.** William Miner departed this life intestate, and administration of his estate was granted to his widow Hannah Miner and James Slaughter, jointly, and they entered into a joint administration bond with Jeremiah Brown and Will. W. Mason, as sureties for the due and faithful administration of the estate. The widow, some time thereafter, intermarried with Abraham Froman, who, consequently, became administrator in right of his wife. The sureties, Brown and Mason, caused a summons to be issued against the said Hannah and Slaughter, on a suggestion that the estate was in danger, to show cause why they should not be compelled to give counter security. On their appearance they failed to give such security, and thereupon the court revoked their letters of administration, and granted administration to Abraham Froman himself, who gave security accordingly.

Froman and wife then filed this bill, charging that Slaughter was the acting administrator before the grant was revoked, and had most of the estate in his hands, and exhibited a settlement of the county court, showing a balance of money in his hands unaccounted for. Froman claims that balance entire as administrator *de bonis non*, and also both claim his wife's distributive share thereof, to be assigned her out of it. The court below decreed in favor of the complainants the entire amount due on the account settled with the county court, not only against Slaughter, but his sureties in the administration bond, who were made defendants; but one of them having answered the bill and resisted the decree. To reverse this decree, this writ of error is prosecuted.

Froman must stand as an administrator *de bonis non*, and can have no greater rights against the money in the hands of Slaughter, than that character entitles him to. The money which he has recovered against Slaughter and sureties has arisen from the hire of slaves and rent of lands, and is the result of his administration. An administrator *de bonis non* is entitled to every specific article which belonged to the decedent, and which is not disposed of or converted into money by the first administrator. Such articles have not been administered, and the administrator *de bonis non* acquires the same interest in them that the first administrator had; but not so with the price of the articles already administered or converted into money. As to their price, the administrator *de bonis non* is not entitled to have an account against the first administrator, or his representatives, as held heretofore by this court: *Graves v. Downey*, 3 Mon. 356. As the bill therefore claims, and the complainants have obtained a decree, not for goods or chattels unadministered, but for an account for moneys arising as the result of Slaughter's administration, and from his undertaking, as guardian, to rent out the lands and receive the rents, the decree giving the whole to Froman is erroneous.

His claim, in right of his wife for her distributive share, is next to be considered, and that amounts to one third of the personalty; but even for this, she and her husband can not be entitled to a decree against the sureties of Slaughter, because they are the sureties of herself also, and it would be absurd to permit her to recover against her own sureties, a sum which she would be bound to restore to them if they had to pay. It is true that one administrator or executor is not liable at common law for the other, but it is equally true that when they enter

into a joint bond, as here is the case, although one of them does not act, or wastes the estate, yet that one by the express letter of the bond remains liable for the faithful administration of the estate, and that not as a surety only, but as principal. Hence, if a recovery on this bond should be had against one or both of these sureties, they might recover the amount thereof, not only only from Slaughter, but from Mrs. Froman also. These sureties may be bound as well as Mrs. Froman to remaining distributees; but as to Mrs. Froman, she can not be permitted to recover against sureties who have entered into engagements, not only for Slaughter, but for her also. This accords with principles adopted by this court in the case of *South's Heirs v. Hoy's Heirs*, 3 Mon. 95. As to Froman himself, by his marriage he has become liable to the legal responsibilities incurred by his wife, and as he claims this estate through her, he can not recover where she can not. The decree, therefore, against the sureties is wholly erroneous, and the bill as to them, in behalf of Froman and wife, ought to have been dismissed. But Froman and wife can maintain their bill against Slaughter alone for her distributive share, and, to do so, the remaining distributees ought to be made parties; for it is clear that one distributee of an intestate's estate is not entitled to account and distribution of the estate, without bringing all the distributees before the court.

The decree must, therefore, be reversed, with costs, and the cause be remanded, with directions to dismiss the bill as to the sureties, with costs, and also to dismiss the bill as to Slaughter with costs, and without prejudice to any future suit for the same cause, unless the complainants shall bring the remaining distributees before the court in a reasonable time given for that purpose.

MOORE v. TANNER'S ADMINISTRATOR.

[5 T. B. MONROE, 42.]

JUDGMENT.—COLLATERAL ATTACK.—The judgment of a court of competent jurisdiction, although the same may be erroneous, is binding until reversed, and can not be collaterally assailed.

A JUDGMENT ADMITTING A WILL to probate, although the will is forged, is conclusive until reversed, and a payment to the executor of a debt due the deceased, will discharge the same, although the probate was afterwards revoked.

ERROR to the Caldwell circuit. Bill in chancery. The opinion states the case.

Haggin, for plaintiff.

Crittenden, contra.

By Court, OWSLEY, J. John Tanner, while residing in the territory of Louisiana, and district of Cape Girardeau, brought two actions of law against Moore in the circuit court of Caldwell county, in this state, and at the June term of 1812, of that court, recovered judgment in each case for six hundred and sixty-six dollars and sixty-six and two thirds cents, and costs.

Moore then exhibited his bill in equity, with injunction against the judgment at law; and executed to the said John Tanner an injunction bond, in pursuance to the order of court and the requisitions of law, on the ninth day of July, 1812. John Tanner afterwards, on the fifteenth day of August, 1812, departed this life, in the territory of Louisiana. At the time of his death, Tanner had no estate of any sort in this state, except the two judgments which he had recovered in the circuit court of Caldwell, against Moore. A few days after Tanner's death, his widow, Sally Tanner, brought all the negroes and other effects belonging to the estate of the decedent to the county of Caldwell, in this state, and presented to the court of that county for probate, a paper purporting to be the last will and testament of her deceased husband. The paper bears date the twenty-fifth day of June, 1812, and was partially proved before the county court of Caldwell, at the October term, 1812, and at the December term of the same year, was fully proved and admitted to record as the last will of John Tanner, deceased. Sally Tanner, the widow, who is named an executrix in the will, at the same term, appeared in court, and in the mode required by law, took upon herself the office of executrix.

After this, an additional injunction bond appears to have been executed to her by Moore, and the suit which Moore had brought in equity, to be relieved against the judgments which John Tanner had recovered in his life-time against him, progressed, until finally, in May, 1819, the circuit court of Caldwell pronounced a decree dissolving the injunction, and dismissing the bill, with damages and cost. About the first of January, 1822, Moore paid one thousand one hundred and fifty dollars, part of the amount due upon the injunction bond, and suit having been brought upon the bond by the executrix, Sally, and Zadoch Thomas, with whom she had intermarried, against Moore, such proceedings were therein had as at the March term, 1824, of the Caldwell circuit court; judgment was recovered

against Moore for one thousand one hundred and ninety dollars and thirty-one cents and costs, being the amount due upon the injunction bond, after deducting the amount paid by Moore. Before this, however, to wit, on the fifth day of September, 1825, James Tanner, who styles himself administrator with the will annexed, of the estate of the said John Tanner, deceased, sued out from the clerk's office of the Caldwell circuit court, a *scire facias* against Moore, to revive and have execution of one of the judgments recovered by the said John, in his life-time, against Moore.

Upon the trial of the *scire facias*, which was had at the March term, 1824, the foregoing facts, together with such as we shall hereafter mention, were argued by the parties, and the law arising from the facts submitted to the decision of the court. In addition to the facts mentioned, it was agreed that the pretended will which was afterwards admitted to record in the county court of Caldwell, was within two or three days after the death of John Tanner, presented by his widow, Sally Tanner, to the judge of probates in Louisiana, where the said John resided at the time of his death, and that the said judge rejected the same, and refused to admit it to record; and that the said Sally thereupon presented to the said judge another will of the said John Tanner, which was received by the judge, proved and admitted to record. This will is dated the thirtieth of August, 1810; and all the persons named as executors therein (among whom is Sally Tanner), having neglected to take upon themselves the execution of the will, administration with the will annexed, was afterwards, on the twenty-sixth of November, 1821, by the county court of Cape Girardeau, state of Missouri, granted to James Tanner, who filed with the clerk of the Caldwell circuit court his letters of administration, before the *scire facias* was sued out. When the will was proved and recorded in the county court of Caldwell, Sally Tanner concealed from that court the facts in relation to the proceedings before the judge of probates in Louisiana; but before Moore made any payment, he was informed by James Tanner that Sally Tanner was not the rightful executrix, and that as administrator with the will annexed, he was entitled, as the rightful and duly qualified representative of John Tanner, deceased, to receive the money. Upon the foregoing facts, it was agreed that judgment should be entered, either for the one party or the other, for part or the whole demand, as the court might decide the law. The court was of opinion that Sally Tanner had no legal right to receive

payment from Moore, and rendered judgment in favor of James Tanner, that we have execution, etc.

We have omitted to set out the law of Missouri concerning last wills and testaments, which is contained in the agreed cause, and we have done so because the decision about to be given would be the same whatever might be the construction put upon that law. The only object which the plaintiff in the court below could have had in view, by introducing into the general case that law was to prove that the paper purporting to be the last will and testament of John Tanner, deceased, which was admitted to record in the county court of Caldwell, and which has been previously rejected by the judge of probates in Louisiana, was, in point of law, not the last will and testament of John Tanner, deceased; and without stopping to give a construction to that law, it may be considered that the judge of probates was correct in pronouncing judgment of condemnation against the will. But, when this is conceded, it does not follow that the defendant Moore can not protect himself against the plaintiff's action, under the payment which he is admitted to have made to Sally Tanner, the executrix named in that will, and to whom probate thereof was granted by the county court of Caldwell.

If not the legal will of John Tanner, deceased, the county court no doubt erred in admitting it to record, and in granting probate to Sally Tanner; but an error of that sort should not, we apprehend, go to exclude the debtor of the testator, Tanner, from availing himself of any payments made to the executrix before a repeal of the grant of probate. The grant of probate is a judicial act, and when done by a court of competent jurisdiction, is, until repealed, conclusive in all other courts. Thus, in Toller's Law of Executors, p. 76, it is said: "So long as the probate remains unrevoked, the seal of the ordinary can not be contradicted; for the temporal court can not pass a judgment respecting a will in opposition to that of the ecclesiastical court; and, therefore, if a probate under seal be shown, evidence will not be admitted that the will was forged, or that the execution of it was procured by fraud, or that the testator was *non compos mentis*, or that another person was executor; for these are points which are exclusively of spiritual cognizance." Again, in page 77, the same author says: "It has been determined that payment of money to an executor who had obtained probate of a forged will, was a discharge of the debtor of the intestate.

although the probate was afterwards revoked, and the administration granted to the next of kin."

We are aware that authority may be found going to prove that payment of money under probate of a supposed will of a living person would be void; but why void? The reason is, that the ecclesiastical court of England had no jurisdiction over the wills of living persons; and, of course, the grant of probate in such a case would neither confer right nor conclude any one in other courts. But over the wills of deceased persons the ecclesiastical court had jurisdiction; and whenever that jurisdiction was exercised by granting probate of a will of a dead person, though the will be forged, or the probate be obtained through fraud, or the like, the probate was conclusive, until revoked; and, by a payment to the executor, the debtor of the testator was discharged. The validity of the payment which was made by Moore to the executrix named in the will, that was admitted to probate in the county court of Caldwell, in this state, must, therefore, depend upon the question, whether or not that court possessed jurisdiction over the will.

This question we understand to have been in effect decided in the affirmative by the supreme court of the United States. In the case of *Fenwick against Sears's Administrators*, it was held by that court that an administrator, having had letters of administration in Maryland before the separation of the District of Columbia from the original states, can not, after that separation, maintain an action in that part of the district ceded by Maryland by virtue of those letters of administration, but must take out new letters within the district: 1 Cranch, 259.

And the same court, in the case of *Dixon's Executors against Ramsey's Executors*, decided that an executor can not maintain a suit in the District of Columbia upon letters testamentary granted in a foreign country: 3 Id. 319. After adverting to the distinction, which appears to have been taken in argument in that case between an executor and an administrator, Chief Justice Marshall, by whom the opinion of the court was delivered, remarks: "This distinction does certainly exist, but the consequence deduced from it does not follow. If an executor derived from the will of his testator a power to maintain a suit, and obtain a judgment for a debt due to his testator, it would seem reasonable that he should exercise that power whenever the authority of the will was acknowledged; but if he maintains the suit by virtue of his letters testamentary, he can only sue in courts to which the power of those letters extends. It is not

and can not be denied that he sues by virtue of his letters testamentary, and consequently, in this particular, he comes within the principle which was decided by this court in the case of an administrator."

Now, if it be true—and that it is, we entertain no doubt—that an executor sues by virtue of his letters testamentary, and that those letters must be obtained from the courts of the country where suit is brought, it follows that the county court of Caldwell, where the judgment was recovered by Tanner in his lifetime, had jurisdiction to grant probate of his will. For the laws of this country are sufficiently comprehensive to confer jurisdiction on all testamentary matters upon the courts of the county where the estate of the testator may be, though he reside and die out of the state; and as, according to the decision of the supreme court, letters testamentary must be obtained from the court of this state to enable the executor to sue here, it was competent and proper for the county court of Caldwell to take jurisdiction of the matter.

We have not forgotten that by an act of the legislature of this state, executors who obtain letters testamentary in any other state are now allowed to sue in this state, without obtaining letters testamentary from a county court here; and the preceding remarks have been made exclusively in reference to the law as it stood before the passage of that act. But we do not admit that by the provisions of that act the county courts of this country have been ousted of any part of their jurisdiction over testamentary matters. The right of suit which that act has given to the executors upon letters testamentary granted in other states, is merely cumulative, leaving to the county courts all the power and jurisdiction which they previously possessed over such subjects. The county court may, notwithstanding the provisions of that act, grant probate of wills in all cases where it would have been before competent for them to do so; and when granted, the executor has the same power that he would have possessed, if the act had never passed.

After the county court of Caldwell acted upon the subject, and granted probate of the will and letters testamentary to Mrs. Tanner, it was not competent for Moore to contest her authority to receive the money which he was owing to the testator, and for which she had brought suit against him; and as her authority to sue for and receive payment of the money has never been revoked, he should not, and can not, be again com-

pelled to pay what he was compellable to pay, and has actually paid her.

Were there, therefore, no objection to the judgment of the court below, it was undoubtedly erroneous not to allow a credit to Moore for the amount which he has paid to the executrix, to whom letters testamentary were granted by the county court of Caldwell.

But we are not of opinion that judgment should have been rendered against Moore for anything in favor of the plaintiff in the court below. We have seen that judgment had been recovered against him by the executrix, to whom letters testamentary had been granted by a court of this country possessing competent jurisdiction to grant probate of the will; and if judgment for any amount should be recovered in this case by the plaintiff in the court below, how, it may be asked, is Moore to be relieved from the payment of either judgment? So long as the letters testamentary, which were granted by the court of this country, are unrevoked, Moore is not at liberty to controvert the authority of the executrix to receive payment of the debt which he is owing to the estate of the testator; and if so, upon what principle is it that the collection of the judgment which she has recovered against him could be prevented, even were judgment recovered against him in this case also? For the amount which Moore has paid the executrix, he most clearly can not be liable to the plaintiff who brought this action in the court below; and if not liable to another for the amount paid the executrix, why should he be liable for that which is not paid her, but which she may hereafter compel him to pay? If he be liable to the action of the plaintiff in this case, it would therefore seem that this liability can not proceed from any principle of natural justice, but must result from some stern and inflexible rule of law. No such rule of law is, however, believed to exist.

Were it not for the act of this state allowing persons to whom administration of deceased persons' estates are granted by the courts of other states to sue in this country, the plaintiff in the court below could not maintain his action, though no probate of the will of the testator had ever been granted by the county court of Caldwell; and we understand that act not to authorize a suit by an executor, or administrator upon letters testamentary, or letters of administration granted in another state, after the courts of this country have acted upon the subject and granted such letters. It is true, that the act has not used language which, in express terms, limits the right of executors and administrators

upon letters testamentary, or letters of administration, obtained from the courts of other states, to sue in this state only, where there is no grant of such letters testamentary, or letters of administration by the courts here; but, by adverting to the old law, the mischief and the remedy, it will be perceived that by passing the act the object of the legislature was to authorize suit upon foreign letters of administration, or letters testamentary, when there should be no person possessing authority under a grant from the courts of this country to sue in right of the testator or intestate; and by limiting the operation of the act to cases of that sort, we shall not only avoid many difficulties and hardships to which debtors, by a different construction would inevitably be exposed, but we shall, moreover, conform to what we understand to have been the intention of the legislature in passing the act.

The judgment must, therefore, be reversed, with cost, the cause remanded to the court below, and judgment there entered in favor of Moore, in conformity with this opinion.

HALL v. AMOS.

[5 T. B. MONROE, 89.]

TROVER—CONVERSION. — A person may be guilty of a conversion without having the actual possession of the property.

ERROR to the Bourbon circuit. **Trover.** The opinion states the case.

Depew, for plaintiff.

By Court, **MILLS, J.** The defendant in error had issued his distress warrant for rent, and caused it to be levied on certain hogs, as the property of his tenant, William F. Hansford. The plaintiff in error claimed the hogs of the officer, who called a jury to try the title. The defendant attended the jury, and actively opposed the claim of the plaintiff before that jury, both by evidence and argument, and procured a verdict in favor of his warrant of distress, and the property was sold at his instance, he being an attendant at the sale, and urging it for his benefit.

The plaintiff then brought his action of trover for the conversion of the hogs, and after proving his title thereto *prima facie*, and that the hogs were disposed of by the defendant as before stated, the court below instructed the jury as in a case of non-

suit, deciding that the defendant never had such possession of the hogs as would subject him to an action of trover; and the jury found for defendant, and judgment was rendered accordingly.

In detinue, the defendant must have had possession; but we know of no authority requiring possession in the defendant, in an action of trover.

In the former action the possession and detention, in the latter the conversion, is the gist of the action; and that a defendant may procure a conversion without being visibly possessed of property, there can not be any reasonable doubt. Indeed, it can not be said that the defendant was ever possessed of the property.

At common law, the landlord himself issued his distress warrant, and chose his bailiff and prosecuted his distress. This bailiff was his agent, and the taking and disposing of the estate was his own act; for *qui facit per alium, facit per se*.

Our legislature, supposing that such power intrusted to the landlord might be an engine of oppression, has imposed a check upon it by requiring the oath of the landlord as to what is due, and directing a justice of the peace to issue the warrant; but still the officer is completely a substitute for the landlord, so far as he acts under his special directions and instance, and is legally authorized to do for the landlord what before he could do for himself; and the warrant could give no authority as to the property of the plaintiff, and as to him, if the property belonged to him, it was a complete conversion; and the decision of the court, therefore, is wholly erroneous, and must be reversed, with costs, the verdict set aside, and the cause remanded, with directions for new proceedings not inconsistent with this opinion.

TROVER—WHAT NECESSARY TO MAINTAIN.—Possession, being *prima facie* evidence of title, will be sufficient to entitle one to maintain trover against a person who can show no better evidence of title: *Hostler's adm'r. v. Skull*, 1 Am. Dec. 583. See note, p. 585, where the nature of the action of trover, and the right of property necessary to maintain the same, are discussed at length. In *Gage v. Allison*, 2 Am. Dec. 682, it was held that a person must have the actual or constructive possession of property to maintain this action: See *Bird v. Clark*, 3 Am. Dec. 269; *Waters v. Van Winkle*, 4 Id. 387; *Laspierre v. McFarland*, 7 Id. 705; *Odiorne v. Colley*, 9 Id. 39; *Jones v. Sinclair*, Id. 75.

WITHERS v. RICHARDSON.

[5 T. B. MONROE, 94.]

STATUTE OF FRAUDS.—Promises to marry are not within the statute of frauds, and need not be in writing.

APPEAL from the Mercer circuit. Assumpsit. The opinion states the case.

Crittenden and Daviess, for appellant.

Haggin, contra.

By Court, MILLS, J. This is an action of assumpsit on a promise to marry, and a verdict and judgment for the plaintiff below; to reverse which this writ of error is prosecuted.

There was a demurrer to the declaration first tried and overruled. We perceive no defect in the declaration. The three counts are drawn according to the most approved forms, and the two last are valid beyond controversy.

Besides the plea of non assumpsit, the defendant pleaded that the contract was in parol only and relied on the statute to prevent fraud and perjuries, and this plea on demurrer was held ill. It has never been held that the words of that statute, "any agreement made upon consideration of marriage," meant or included promises to marry. It would be imputing to the legislature too great an absurdity to suppose that they had enacted that all our courtships, to be valid, must be in writing.

The defendant pleaded, or rather attempted to plead, the statute of limitations; and there was no replication to that plea, and this is relied on to reverse the judgment. If the plea had been good, the want of a replication thereto, according to previous decisions, might have been fatal.

But the plea is, that the defendant did not assume within five years, instead of *actio non accrevit*; the action did not accrue within five years before the emanation of the writ. Now, it is evident that the statute did not begin to run from the making of the promise, but from the breach of it, and the plea is, therefore, wholly immaterial; and it would be absurd to reverse the judgment because the plaintiff did not answer an invalid plea.

The remaining question is made on the admission of evidence. The plaintiff introduced a physician as a witness, who, among other things, stated that he attended upon, and prescribed for, the plaintiff during her pregnancy. He was interrogated by the defendant's counsel, whether he had not prescribed for some other disease besides pregnancy; to which the witness

answered that he had, and the only knowledge that she had any other disease was derived from the plaintiff herself, which induced him thus to prescribe. The defendant's counsel ceased the interrogation here, declaring that he did not want or intend to make use of any of the declarations in communications of the plaintiff to the witness, showing that she had such other disease. The counsel for the plaintiff insisted that, as the defendant's counsel had gone thus far, and elicited the fact that the plaintiff had some other disease by her own communications, he had a right to bring out the whole of that communication of the plaintiff at the same time that she communicated that fact to the physician. This was objected to by defendant's counsel; but the court overruled the objection, and the physician answered, that the communication of the plaintiff which disclosed to him that she had another disease, also informed him that the disease was venereal, and that it had been communicated to her by the defendant. To this decision of the court an exception was taken.

The rule that when one party attempts to avail himself of the declarations or admissions of his adversary, he must take all made at the same time, is well settled and well understood; but the difficulty here consists in determining whether this case comes within the rule, and whether it does or does not, it must be confessed that it is near the boundary line; and on due consideration, we are of opinion that it comes within it. It seems to be clearly the intention of the defendant to avail himself in excuse or mitigation of damages of the fact that the plaintiff had another disease, while the fact rested on her own confessions or private communications to her physician. Thus far and no farther, he was satisfied to have it; and it is easily seen how it might be thence inferred that this disease was of an impure character, and therefore the defendant might be excused from marrying her. If, on the contrary, the same declaration imputed that impurity to her illicit connection with the defendant, it is easily perceived that it aggravated his offense.

Under such circumstances the defendant ought not to have been permitted to avail himself of the existence of the fact, resting exclusively on her own communication, without taking the communication disclosing it entirely; and the court, therefore, did not err in permitting it.

Judgment affirmed, with costs and damages.

BRECKENRIDGE v. WATERS.

[5 T. B. MONROE, 150.]

RESCISSIION, WHEN EQUITY WILL RESCIND.—Equity will not rescind a conveyance where a purchaser buys with full knowledge of all the facts, and there has been no fraud.

APPEAL from the Jefferson circuit. Bill in chancery. The opinion states the case.

Grayson and Denny, for the appellants.

Guthrie, contra.

By Court, **BIBB, C. J.** On the fifteenth of November, 1814, Breckenridge accepted a deed from the heirs of Richard Jones Waters, deceased, for two parcels of land, lot 191, in Louisville, and the point of Beargrass, for the sum of one thousand three hundred dollars, in which deed is recited the circumstances under and by which the heirs and grantors in the deed derive their claim and authorities to make it, of which these only need be recited; that Daniel Brodhead, by his indenture of the seventeenth day of September, 1788, and recorded in the clerk's office of Jefferson, in deed book 3, and pages 64 and 65, did bargain and sell the said parcel of land to the said Richard Jones Waters; that the said Richard Jones Waters died without issue and intestate, leaving Thomas and Daniel Jennings entitled to one fifth part, and Thomas Jones Waters, Mary Waters, Rachael Mariott and Ann Mariott to one fifth part each of his real estate as parceners and heirs of said Richard Jones Waters.

The deed, after reciting minutely all the authorities by which the grantors in the said deed profess to sell and convey, contains a stipulation that the sale and conveyances intended by the indenture is made "upon the declared and express condition" that the grantors, or either of them, shall not upon any event, "or to any extent whatever, at law or in equity, warrant the right or title to said lot and piece of ground, or either of them against any persons or person whatever, or be bound to repay or refund any part of said one thousand three hundred dollars, or pay damages for any cause whatever."

In 1819, Breckenridge and Maupin exhibited their bill to rescind the contract, and to have their obligations for the purchase-money delivered up, alleging for cause of complaint that the grantors, pretending to have an indefeasible title as the heirs of said Richard Jones Waters, sold the said lands; that,

since the execution of their obligations, it was discovered that said Richard Jones Waters had left a last will and testament; "that the original of said will was found and brought to this state, and is now, as your orators believe, in the hands of James S. Bate or Leonard Jones; that the whole of said will is in the writing of said Richard Jones Waters, and that he therein declares in substance that the conveyance or conveyances made to him, Waters, by one Daniel Brodhead was done with a view of protecting the said property from the claims of Brodhead's creditors, and that he, Waters, had no claim, right or title to the said lots of ground." The bill then charges that said Richard Jones Waters had no claim except that derived from Brodhead; that the grantors in said deed to the complainants, "well knowing the above facts, have failed and refused to deliver to your orators the said obligations to be canceled."

The defendants, who are of full age, and the infants by their guardian, deny that they have any knowledge or belief that said Waters left a will, but insist that he died intestate, and demand proof of his testacy; they admit that long since the execution of said obligations they have heard that Bate and Jones pretend to have a paper purporting to be the will of said Waters, but they have no knowledge of it, and pray that the complainants be required to make due proof of their allegations; they deny any knowledge of the causes or considerations upon which the said Brodhead made the conveyance to said Waters; that, finding the deed of record, and verily believing, as they yet believe, that they are entitled as heirs at law, they sold upon the conditions expressed in the deed, at a price greatly below the real value of the land, etc.

The copy of the paper purporting to be the will of said Waters was read by consent, to have the effect as if the original was produced, and is admitted to be wholly in the handwriting of said Waters.

The answer of the guardian of the infants denies it to be the last will and testament of Waters, assigns causes why the paper can not be the will and testament of Waters, nor affect the title of the grantors in said deed, and insists that, by the said paper purporting to be the will, the real estate is devised to the same persons who are his heirs at law.

The paper purporting to be the will of Waters bears date on the thirtieth day of August, 1788; the clause relied on in his will, by the complainants, recites that he had taken a bill of sale of all his (Brodhead's) property, as the said bill will show, "and

taken the partnership stock of goods into his possession, and expects a consignment of other goods, and to make collections for said Brodhead, all of which will be done in such manner as if the property was his own; that it was done to prevent some creditors from sacrificing the property and to enable Brodhead to pay all his debts; therefore, his executors are required to account fairly with Brodhead for all sales, to restore his property with all convenient speed, and selecting all such mentioned bills of sale, after satisfying the balance that may be found due said Richard, which will be found by examining a book entitled the 'Diary and memorandum book of Richard Jones Waters & Co.;' in this book will be found the exact situation of said Daniel Brodhead and myself, and the substance of the contract subsisting between us."

Upon hearing, the judge dismissed the bill, but without prejudice to any future suit, both parties appealed, but the complainants only are now prosecuting the appeal.

It is evident, from the recitals in the deed of bargain and sale to Breckenridge, now complained of, that the contract was based upon an inspection of the recorded deed from Brodhead to Waters, the known relationship in which the grantor stood to said Waters, the absence of probate of any will of Waters, and his supposed intestacy as to that property; the complainants now do not charge any fraud, nor that the defendants then had any knowledge of the paper since produced upon this trial; it is not pretended by the bill that the defendants are not the heirs at law of said Richard Jones Waters; it is not pretended but that if said Waters had title to the estate it would have descended to the defendants, if said Waters had died intestate. The bill attacks the contract of sale upon the ground that Waters did not die intestate, and that the declaration made therein, as to the intent to hinder and delay the creditors of Brodhead, has sapped, undermined and destroyed the title of Waters, as granted and conveyed to him by Brodhead by the deed of the seventeenth day of September, 1788.

By the paper purporting to be the last will and testament of Waters, there is no devise of his real estate to his executors; there is no devise or clause in the will which passes the title away from the heirs at law of any real estate whereof Waters was the owner or might devise. The will as produced is no obstruction to the title of the heirs at law of Waters, as in case of intestacy, provided the clause in relation to the acknowledgment of having received a bill of sale from Brodhead to defeat

his creditors does not so impugn and invalidate the title of Waters to the lots and parcels of land mentioned in the deed of the seventeenth of September, 1788, as to prevent the heirs at law from taking the lands by inheritance from their ancestor.

It is clear that this recital is the will made in August, 1788; that Waters had received the bill of sale of all Brodhead's property, can not be applied to the conveyance made by Brodhead to Waters in the following month of September. The bill of sale had been made before August, 1788, which is alluded to in the will; and what property was included in that bill of sale, "the said bill of sale will show," as the testator said; but it is not produced, neither is the agreement between said Waters and Brodhead, referred to by the will as being in "the diary or memorandum book" produced. So far as we can collect from the will itself, the bill of sale was of personal property; the executors were to restore such as was unsold, the balance due Waters, however, to be first satisfied. No real estate was devised to the executors; by the will they are not vested with the legal title to the real estate, nor authorized to sell or to convey it. The legal title, therefore, which was conveyed to Waters by the deed of Brodhead of September, 1788, did pass by descent to the heirs at law of said Waters; and so far as can be collected from the exhibits and proofs in this cause, it has descended to the heirs at law, not infected by any acknowledgment contained or referred to in the will of August, 1788.

The bill does not pretend that the real estate has been devised away from the heirs at law; but the intent of the parties to the deed of 1788, is supposed to have been fraudulent, and a contrivance between them to delay, hinder, and defeat Brodhead's creditors. Suppose it were so, there is no pretense for saying that the defendants covenanted that their ancestor had a sure and indefeasible title by virtue of that conveyance, nor that they had inherited a sure and indefeasible title. On the contrary, it is clear that the complainant saw the deed of 1788 of record, and believing Waters to have died intestate as to his real estate, he purchased from the heirs without warranty or assurance of any kind, resting the title upon the facts stated in the deed from the defendants to the complainants, being a risk agreed to be undertaken by the complainants as to the title of the defendants, a catching bargain. The intestacy is true in the sense in which it was asserted; the facts upon which the bargain was made are not changed, nor the risk increased by producing the paper purporting to be the will.

That will bears date in 1788, and the facts had then transpired; the deed under which the complainant purchased of the heirs was made in 1788; although thirty years and more had expired before the bill filed, yet that deed remains unimpeached. The bill does not allege an eviction, nor any claim whatever asserted adverse to the deed of 1788, upon which the contract was based. The complainants apprehend a defect of title; but no foundation is shown for that apprehension, much less for setting aside a contract which, upon its face, was a catching bargain on the part of the purchasers upon the facts known. There has been neither a suppression of the truth nor a suggestion of falsehood. The complainants agreed to run the risk of paramount claims; they must abide by their contract.

There is no error in the decree to the prejudice of the complainants, the present appellants, and they must pay to the appellees their costs in this behalf expended.

EQUITY will not relieve against an unfortunate bargain: *Pollard v. Lyman*, 2 Am. Dec. 63. Upon the subject of the jurisdiction of courts of equity to decree the rescission of contracts, see *Hough's Administrator v. Hunt*, 15 Am. Dec. 569, and note thereto, 572.

ALEXANDER v. LIVELY.

[5 T. B. MONROE, 159.]

PATENT, CONSTRUCTION OF.—A construction that gives effect to a patent is to be preferred to one that renders it inoperative and void; and, in determining what land is embraced within the calls of a patent, reference may be had to the surveyor's field notes and the original plat, if the patent itself is uncertain.

APPEAL from Christian circuit. **Ejectment.** The opinion states the case.

Mayes, for appellant.

Crittenden, contra.

By Court, **MILLS, J.** This is an ejectment, and the question to be decided is the validity of the patent of the lessor of the plaintiff, or whether it is void for uncertainty, or whether the defect therein is an omission or mistake, which ought to be supplied from a consideration of the patent and plat, and certificate of survey taken together. This question was decided for the defendant in the court below.

The quantity called for in the patent and certificate of survey

is eighty-four acres, and is said, in both these documents, to be included in a figure of five lines and angles; but the plat annexed to the certificate of survey represents the figure as one of six lines. If the quantity is surveyed in five lines, or attempted to be thus laid down, pursuing the courses and distances given in both patent and certificate, after coming to the third course from the beginning, and attempting to run the third line, it will intersect the first and last line of the patent, and include only two small triangles of from one to three or four acres each, and the fourth and fifth lines, so far from closing the survey, will run without the figure still further off, and place the operator much further from closing the survey than he was at the third corner; and the quantity will never be had, and the last line will never come to the beginning, as asserted in both the patent and certificate of survey. This will make the call for the third line conflict with the last.

And it is insisted that it proves that the surveyor did not make the survey, and that the patent is void for uncertainty. This conclusion, however, can not be admitted. There is not only a presumption, but a strong one that the officer did his duty, and his report is designed to be evidence that he did it, and we must, therefore, examine his report; and if his lines will not close, we ought first to ascertain whether there is a mistake, and whether, from the face thereof, we can ascertain what and where that mistake is before we can conclude that the patent is void.

For the first, second and third courses of this patent trees are called for, and for the rest of the corners stakes or posts are called for. We can not derive any aid to this patent from the parol proof, for that only fixes the first, second and third corners; and a chain-carrier at the making of the original survey deposes that they only made these three corners, and that the surveyor there stopped, and did not proceed further. But although the law directs the surveyor to see the whole survey marked and bounded, and it is the duty of the surveyor to do so, yet this is the only directory to the surveyor, who is the agent of the government, chosen for and not by the owner of the warrant, who ought not to lose his rights, even if the surveyor did not perform his duty, if the place where the patent is situated can be ascertained; and we can ascertain from what is done the figure of the survey including the quantity.

This brings us back to an examination of the patent, aided by the plat and certificate of survey; and we have seen that

the certificate does not cure but agrees with the patent. But from the patent and certificate alone we can ascertain that there is a mistake. And in pursuing the inquiry as to where the mistake is, we have more than one call opposed to another to point out the place. If there was nothing else opposed to the third call but the last, the testimony of each might be equal, and we might not be able to determine between them. But the impossibility of making any survey if the third course is pursued, and the call for quantity are likewise opposed to the decisive testimony of the third call. Add to this, if we commence at the beginning and run to the third corner, and then return to the beginning and reverse the last and two next preceding lines, we will form an unclosed survey, or one which may be closed by one additional line; and where so closed it will include the quantity desired, which indicates that this open line has been omitted by the surveyor through mistake. Add to this, if we suppose any other line than this open or third line, to be omitted, and attempt to close the survey, the attempt will prove abortive, and the construction of another figure is impossible. Thus the calls of the patent and certificate alone go far, when all the calls are taken together, to point out what and where the mistake is; that is, that the surveyor omitted an entire line. But we are not left to decide the case here. For when the plat is inspected, it exhibits to the eye at once a figure precisely corresponding with the one which we have constructed by inserting the omitted line; and, indeed, exhibits the third line itself, which was the one omitted.

The plat is a necessary part of the surveyor's report, required by law, and is therefore proper evidence in ascertaining the position of the land, and what is included, and must settle the figure in this case and prove the mistake. This accords with many other decisions of this court, in construing the acts of ministerial officers, *ut res magis valeat quam pereat*.

It has often happened that surveyors have one or more lines bounded by streams of water, calling for divers courses, as meanders thereof, and the plat itself exhibits the stream as composing such lines. But when there is an attempt to run these courses and distances contained in the certificate of patent, they will not follow the stream at all, but widely depart therefrom. In such a case it has been held that the stream must control the courses and distances called for, because the plat makes the stream the boundary.

We therefore conclude that the plat in this case must be held

sufficient, under these circumstances, to supply this omitted course, and to correct the silence or the omission of the certificate and patent, and that the court below erred in refusing to supply this omitted line and sustain the patent; and the judgment must be reversed, and the verdict be set aside, with costs, and the cause be remanded for new proceedings, not inconsistent with this opinion.

JACKSON v. MURRAY.

[5 T. B. MONROE, 184.]

THE DEED OF AN ATTORNEY IN FACT AUTHORIZED BY PAROL TO CONVEY will not pass the legal title, but the same may be sufficient to raise an equity.

AGENT—AUTHORITY NEED NOT BE IN WRITING.—To make a contract valid under the statute of frauds, it is not necessary that the agent's authority be in writing. If the signature of the principal be affixed by a person authorized by parol, this is sufficient.

DOUBTFUL TITLE, acceptance of, not decreed.

A COURT OF EQUITY will never compel a vendee to take a title not free from controversy.

ERROR to the Ohio circuit. Bill in chancery. The opinion states the case.

Crittenden, for plaintiff.

Mayes, contra.

By Court, BIBB, C. J. On the twenty-eighth of September, 1818, David and John Murray executed their obligations to Julius and Elias Jackson, to convey a lot of ground in ten days, with general warranty, in consideration of nine hundred dollars. One half of the price being paid, the Murrays obtained judgments at law against the Jacksons for the residue; the Jacksons exhibited their bill for injunction and relief, on the eighth of November, 1819, complaining by that and several amended bills of defect in title and incumbrances, so that Murray had not and could not convey; and praying for a rescission of contract, unless the Murrays should remove the incumbrances, and exhibit a clear title and convey it.

The incumbrances and defects of title to the lot complained of were: 1. The rights of dower in the widow Madison, and others not conveyed nor released; 2. The defect in the conveyance from Gabriel Madison, the patentee, because it purported to be made by an attorney in fact, and there is no power of attorney from Madison; 3. That Remus Griffith has commenced

his suit in equity against the Murrays, Jackson, and others, asserting his superior equity to the lot.

The defendants have procured a relinquishment of the dower rights pending the suit. And by the decree rendered in this cause against the heirs of Madison and of Eleanor Morgan, had at the instance and upon the answer of the Murrays, making new parties and proceeding against them as upon a cross-bill, according to the statute in such cases provided, it might be considered that the title so decreed to the Murrays was clear and ought to be accepted by the complainant Jackson, if the objection on account of the claim of Griffith was out of the way.

The facts in relation to the title of this lot and others, as asserted by the Murrays, are these: Gabriel Madison having succeeded and recovered in a controversy the land, including the town of Hartford, agreed to confirm the titles to the purchasers of lots held under an adversary claim; and Harrison Taylor, as the attorney or agent of Gabriel Madison, executed a deed on the sixteenth of January, 1797, to Eleanor Morgan, for lots Nos. 53, 64, 9, 79, and two lots of three acres each, Nos. 27 and 28. Taylor had no letter of attorney; but it is proved in this cause that Madison acknowledged Taylor as his agent in transacting the business relative to the sales of the town lots. On the sixteenth of April, 1818, Eleanor Morgan deeded the lots 53 and 54 to Aquilla Field, reciting as a consideration a decree of the court of quarter sessions of Ohio, in the year 1802, ordering the lots to be sold, and that Field had become the highest bidder at that sale, and that the decree was in a suit between Aquilla Field as complainant, and said Eleanor Morgan and John McCormack, the defendants.

On the fifteenth of January, preceding the deed to Field, he deeded lot 64, improved by Charles Wallace, and on which John Murray then lived, to David and John Murray.

By the amended bill of the Jacksons, filed at the October term of the Ohio circuit court, they allege that, since filing their original bill, Remus Griffith, claiming the lot sold to them by the Murrays with other lots in the town, had impleaded the said Murrays, the said Jacksons, and others; and the bill of Griffith then filed in the said court against them and others is referred to, and a copy of the said bill is exhibited to show how Griffith asserts his equity.

Griffith claims to have purchased of the heirs of John Morgan; that lots 53 and 64, in the town, had been settled and improved by Samuel Neal, and under the terms and conditions

for building and improving agreed upon by Robert Baird, who laid off and established the town, said Neal became entitled to the said lots; that Gabriel Madison recovered the land, including the town, in a controversy, by virtue of an adverse conflicting patent; and after the event of said suit, said Madison confirmed to the settlers the stipulations made with them by Baird, and bound himself to convey the lots 53 and 64 to said Neal, who before he obtained any deed from Madison sold to John Morgan, who had departed this life, leaving John Morgan, Thomas Morgan, Hannah Morgan, and Ella Morgan, his children and heirs at law; after his death, Harrison Taylor made a deed to Eleanor Morgan, the widow of said John Morgan, without any consideration, but voluntarily and in fraud of the rights of the heirs of Morgan, of which claim the said Eleanor had notice; that said Eleanor had sold to Field, who had notice of the claim of Morgan's heirs; and he had sold to the Murrays, they having notice of the claims of Morgan's heirs; and that they had sold to the Jacksons, and they are charged as having notice of the claim of Morgan's heirs. To this bill by Griffith, the heirs of Gabriel Madison, said Elias and Julius Jackson, Samuel Neal, the heirs of said John Morgan, are also made parties along with the Murrays and Jacksons.

This amended bill of the Jacksons so showing the claim and bill by Griffith, prays that the defendants, the Murrays, may interplead with Griffith, and that they quiet said Griffith's claim, and procure a release of it; this bill, the defendants, the Murrays, answered in July, 1823, and for defense, say that they purchased without notice, and that they have the legal title by virtue of the deeds before set forth by them; they progress against Madison's heirs and others, without making Griffith a party.

And in October term ensuing, by an amended answer, the Murrays exhibit a deed from the heirs of Gabriel Madison to them of the fifteenth of October, 1823, made by George Madison for himself, and as attorney in fact for the other heirs, three of whom by said deed, and by the power of attorney filed to support the deed, appear to be married women, resident in this state; and the power of attorney is recorded in Ohio county, upon the certificate indorsed by the clerks of Christian, Jessamin, and Montgomery counties, that the parties had acknowledged power of attorney before them.

The suit by Jacksons against the Murrays, and of the Murrays against the heirs of Gabriel Madison, Aquilla Field and Wallace, were heard in April, 1824; whereupon the court decreed that the

heirs of Madison should convey to the Murrays by deed, with special warranty against themselves and all claiming under them, on or before the first of March ensuing, and upon their failure, it is ordered that Charles Henderson be appointed a commissioner to convey for them; that the said Murrays do convey to Jackson, by deed, with general warranty, to be executed after the date of the deed of Madison's heirs to them; that said Murrays, "upon the execution of the deed by them aforesaid, may proceed to have the benefit of their judgment at law, and the injunction of the complainants is hereby dissolved;" "that this suit be dismissed as to the defendants, Wallace and Field, and that the complainants recover against the defendants, Murrays, their costs in this suit expended."

By an amended decree, it was ordered that the defendants, Murrays, shall not have the benefit of their judgment at law, until the deeds directed to be made, shall be approved by the court, and to that end the commissioner appointed herein is directed to make his report at the next term.

At the July term, 1824, the commissioner reported a deed by him of the fourteenth of May, on behalf of Madison's heirs to the Murrays, and a deed of the twenty-fifth of June, 1824, from the Murrays and their wives to the Jacksons, only acknowledged before the clerk of the county court, with the privy examination of the wives, and admitted to record, which deeds were approved by the court, and ordered to be recorded.

The deed from Gabriel Madison, by Harrison Taylor, as his attorney in fact to Eleanor Morgan, did not pass the legal title, Taylor having no letter of attorney; but nevertheless that deed is sufficient to raise an equity against Madison, because of the proof of his acknowledgment that Taylor was his agent in that behalf. To make a contract valid under the statute of frauds and perjuries, it is not necessary the authority of the agent should be in writing; if the agreement be signed on the behalf of the principal by a person thereunto authorized, although by parol, it is sufficient, as decided in *Irving v. Thompson*, 4 Bibb, 296; *Waller v. Hendon*, 5 Viner, Contract (A.) pl. 45, page 524; *Stackpole v. Arnold*, 11 Mass. 27 [6 Am. Dec. 150]; *Miller v. Hayman*, 1 Yeates, 23; *Long v. Arnold*, 11 Mass. 97.¹

The legal title to part of the interest of the heirs of Madison was acquired by the deed of the heirs, of October, 1823; but as to the married women that deed was wholly inoperative. So that the legal title was never completed in the Murrays, until they

1. *Long v. Colburn*, 11 Mass. 97; 6 Am. Dec. 160.

obtained the deed of the commissioner as approved by the court. But long before the deed of October, 1823, the Murrays had full notice of the equity asserted by Griffith, and are, therefore, purchasers with notice. They have neither produced any release from Griffith, nor would they make Griffith a party to their suit against Madison's heirs, nor have they shown the decision of the suit by Griffith against them, nor awaited the event, but have suffered the bill of the Jacksons and their proceeding against Madison's heirs and Field, and the heirs of Eleanor Morgan, to come to a hearing, leaving the claim of Griffith not sufficiently answered or avoided.

The decree of a court of equity, compelling a complainant to show a breach of contract by the vendor, and, therefore, asking a rescission of the contract, or a good title, should never compel the complainant to accept any other title than such as appears free from controversy. If it appears that the title is controverted, and a bill instituted, that claim should be extinguished, or shown to be decided, barred, or released, before the chancellor compels the complainant to accept a title and pay the purchase.

Without running into the doubts and difficulties which grow out of the proceedings against Madison's heirs, and the derivation of title from Eleanor Morgan, it is sufficient to say that the Jacksons were entitled to know the fate of Griffith's equity, asserted by him in his suit, and to be protected against it. He was compelled by the decree, to accept a title not clear, but doubtful, disputed, impleaded, and undecided, so far as appears in this suit.

It is, therefore, ordered and decreed that the decree of the circuit court in the cause between the Jacksons, complainants, and Murrays, etc., defendants, be reversed, that the cause be remanded, with directions to rescind the contract in the bill mentioned, unless the defendants shall, in a reasonable time, make Remus Griffith a party, by amending their answer, and calling him before the court (according to the statutes in such cases provided), or quiet the complainants against his claim, and to retain this cause until the suit by Remus Griffith against the defendants, Murrays and others, shall be decided, if not already done, and for such other and further proceedings herein as are consistent with the principles and usages of equity.

And it is further decreed and ordered that the defendants pay to the plaintiffs their costs in this court in this behalf expended.

STATUTE OF FRAUDS—CONTRACTS AFFECTING REAL ESTATE.—The fourth section of the statute 29 Car. II, c. 3, generally known as the English statute for the prevention of frauds and perjuries, provides that “no action shall be brought upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.” Similar statutes have been adopted in many of the United States, and in accordance therewith it has been uniformly held that to render a contract or sale of lands or any interest therein valid, so that an action might be maintained thereon, the same must be in writing signed by the party to be charged therewith: *Smith v. Burnham*, 3 Sumner, 435; *Hughes v. Moore*, 7 Cranch, 176; *Simms v. Killian*, 12 Ired. 252; *Toppin v. Lomas*, 30 Eng. Law and Eq. 427; *Richards v. Richards*, 9 Gray, 313; *Scott v. McFarland*, 13 Mass. 309; *Marble v. Marble*, 5 N. H. 374; *Kelly v. Stanberry*, 13 Ohio, 408; *Madigan v. Walsh*, 22 Wis. 501; *Keeler v. Tatnell*, 3 Zabriskie, N. J. 62.

Notwithstanding the statutory provisions mentioned, courts of equity possess the power to enforce the specific performance of verbal contracts for the sale of land in cases of part performance of such contracts. Nothing, however, can be regarded as a part performance to take a verbal contract for the sale of land out of the operation of the statute which does not place the party in a situation which is a fraud upon him, unless the contract be executed. The statute of frauds was enacted for the purpose of preventing frauds, and not to encourage and sustain them, and when a party claims a right to a conveyance of land under a parol or verbal contract, on the ground of part performance, courts of equity will always grant the relief sought, provided the existence of the contract is established by clear and satisfactory proof and the acts of part performance are such that it would be fraudulent for the other party to ignore his agreement; and these acts of partial performance must be such as resulted from and would not have been done but for the particular parol agreement charged in the complaint or answer as the case may be; besides which the agreement must be certain in its terms and just and fair in all its parts: *Phillips v. Thompson*, 1 Johns. Ch. 149; *Parkhurst v. Van Cortland*, 14 Johns. 15 [7 Am. Dec. 427]; *German v. Machin*, 6 Paige, 288; *Colson v. Thompson*, 2 Wheat. 336; *Blum v. Robertson*, 24 Cal. 142; *Clinan v. Cooke*, 1 Sch. & Lef. 41; *Lindsay v. Lynch*, 2 Id. 1, 7; *Lacon v. Mertins*, 3 Atk. 4. In *Phillips v. Thompson*, the chancellor said: “It is well settled that if a party sets up part performance to take a parol agreement out of the statute, he must show acts unequivocally referring to, and resulting from, that agreement, such as the party would not have done unless on account of that very agreement and with a direct view to its performance; and the agreement set up must appear to be the same with the one partly performed. There must be no equivocation or uncertainty in the case. The ground of the interference of the court is not simply that there is proof of the existence of a parol agreement, but that there is a fraud in resisting the completion of an agreement partly performed.”

Nothing, however, is considered a part performance so as to entitle a parol agreement to specific performance that does not put the party into a situation that is a fraud upon him if the agreement be not performed. Payment of money is not part performance so as to take an agreement touching lands out of the statute: *Clinan v. Cooke*, 1 Sch. & Lef. 40.

AGENT'S AUTHORITY TO SELL LAND NEED NOT BE IN WRITING.—It is not necessary that the authority of an agent to sign the memorandum re-

quired by the fourth section of the statute of frauds should be in writing. A parol authorization is sufficient; and a person who as agent or attorney signs the name of his principal to the memorandum required is, although not authorized in writing, considered as a person "lawfully authorized;" and although a deed executed by a person as the agent of another, may be ineffectual as a conveyance of the legal title, because the authority of the agent was not given by a written instrument under seal, it may be upheld in equity as evidence of a contract to sell; and the same will be considered sufficient, as stated in the principal case, "to raise an equity" in the grantee which will be specifically enforced: *Irvine v. Thompson*, 4 Bibb, 296; *Stackpole v. Arnold*, 11 Mass. 27; 6 Am. Dec. 150; *Johnson v. McGurder*, 15 Mo. 365, 370; *Blood v. Hardy*, 15 Me. 61; *Morrow v. Higgins*, 29 Ala. 450; *Ledbetter v. Walker*, 31 Ala. 176; *Groff v. Ramsey*, 14 Minn. 44; *Pringle v. Spaulding*, 53 Barb. 17; *Newton v. Bronson*, 3 Kernan (N. Y.) 593; *Emmerson v. Hellis*, 2 Tann. 38-46; *Clinan v. Cooke*, 1 Sch. & Lef. 31; Whart. on Agency, secs. 51, 52; *Jones v. Marks*, 47 Cal. 242. In *Ledbetter v. Walker*, 29 Ala. 176, Walker, J., states the rule, which seems to be well settled at the present day, as follows: "Kimball's authority, as the agent of Cooke, to sell the land in controversy, is an established fact in this case. That authority was verbal. A verbal authority is sufficient to authorize the performance of any act which is not of such a nature as to require that it be done under seal. A contract to sell land may be valid, and may transfer the equitable title, although the writing which evidences the contract may not be under seal. If an agent having a verbal authority should make the contract by deed, which would have been valid if made by writing without a seal, the contract will inure as a simple contract, and the writing will take the contract out of the statute of frauds." If possession follows the execution of such a deed, together with the payment of the purchase-money, the equitable title so vested in the grantee is superior to the legal title of a subsequent grantee of the principal, with notice of the conveyance by the agent; and such subsequent grantee may be decreed to convey the legal estate to the holder of such equitable title: *Groff v. Ramsey*, 15 Minn. 44; *Jones v. Marks*, 47 Cal. 248. Notwithstanding it is true that a power to sign the name of a principal to a contract of sale may be given verbally, the words used should be distinct and clear in their meaning and import: *Duffy v. Hobson*, 40 Id. 240, 245; *Treat v. De Celis*, 41 Id. 202.

UNAUTHORIZED EXECUTION OF A DEED MAY BE RATIFIED BY PAROL.—A deed executed by a person as agent of another, although such person be totally unauthorized, may be subsequently ratified by parol, and such ratification renders the same as valid and binding as if the deed had been executed by the principal in the first instance: *Holbrook v. Chamberlain*, 116 Mass. 161; 17 Am. Rep. 146; *Cady v. Sheperd*, 11 Pick. 400; *Swan v. Stedman*, 4 Met. 548; *McIntyre v. Park*, 11 Gray, 102; *Peine v. Weber*, 47 Ill. 45; *Drumright v. Philpot*, 16 Ga. 424; *McDonald v. Eggleston*, 26 Vt. 154. A contrary rule, however, seems to be established in Tennessee: *Forbeville v. Ryan*, 1 Humph. 113; *Smith v. Dickinson*, 6 Id. 261; see *Tappan v. Redfield*, 1 Halst. Ch. (N. J.) 339; see generally, as to effect of a sale of land by an agent authorized by parol: *Ewing v. Tees*, 2 Am. Dec. 455; *Talbot v. Bowen*, 10 Id. 747.

EQUITY will not decree a specific performance where the title is defective: *Edwards v. Handley*, 3 Am. Dec. 745; and note to *Findley v. Wilson*, 14 Am. Dec. 71.

HOWARD'S WILL.

[5 T. B. MONROE, 199.]

WILL, ATTESTATION OF.—An attestation in the same room with the testatrix is a sufficient subscription in her presence.

THE TESTIMONY OF THE SUBSCRIBING WITNESSES to a will is not conclusive as to the sanity or insanity of the testator.

APPEAL from Jessamine county court. Application for the probate of a will. The opinion states the case.

Haggin, Crittenden, Barry and Loughborough, for appellant.

Woodson and Hewitt, contra.

By Court, BIBB, C. J. On the nineteenth of February, 1827, a paper purporting to be the last will and testament of Alsey Howard, then recently dead, was produced in the county court of Jessamine, and offered for probate by Mrs. Sarah Howard, the executrix and sole devisee named therein. The probate was contested by one of the heirs at law, and finally refused, from which the executrix has appealed.

This paper bears date on the twenty-fifth of July, 1807; is attested by Joseph Crockett, Samuel Howard and Elizabeth Howard; the will was written by Colonel Joseph Crockett, the attesting witness, as dictated by the testatrix; her name was written thereto by Colonel Crockett in her presence; she signed the will by making her mark, and all the subscribing witnesses agree that it was signed by the testatrix in their presence. That they saw her sign, that they attested, and that the paper offered for probate is the same so signed and so attested by them, all the witnesses depose.

But it is contested, on behalf of the heirs at law, upon two grounds: 1. That the paper was not attested by two of the witnesses, as required by the statute, subscribing their names in her presence; 2. That the said Alsey was not of sound mind.

1. As to the attestation. Colonel Crockett, whom all agree is a man of integrity, of irreproachable character, above all suspicion, deposes that he wrote the will by her dictation; as to the bequest and devise to her mother of the whole estate, real and personal, that he signed her name by her direction, at her request, and in her presence; that the other witnesses attested to the writing in the same room with the testatrix; and that she acknowledged it to be her will and testament. When asked as to the state of her mind, he answers he saw nothing amiss, and she dictated the disposition of her property without the interference or assistance of any one.

Elizabeth Readon, formerly Elizabeth Howard, another subscribing witness, in her deposition of the fifth day of March, 1827, taken upon commission, deposed that Alsey Howard signed the will; that Colonel Crockett, Samuel Howard, and herself attested it in the room where the testatrix was lying; that when said Alsey made her mark to the will, her understanding was then as good as it was in common, and "that she had common sense."

Against this testimony, the heirs at law produce the witness Samuel Howard, whose competency is objected to by the executrix, and his testimony was taken by the court, subject to the question of competency. He declared that he believed himself interested in destroying the will; that he came for the purpose of doing it, and produced a paper duly executed and recorded from his father, who is one of the heirs at law of the said Alsey Howard (that is to say, her brother), by which he gives to his said son, Samuel Howard, half the negroes then owned and possessed by his mother, Sarah Howard, and half the negroes owned and possessed by his sister, the said Alsey Howard, and the other half of the said negroes he gives, by said instrument, to his said son Samuel and his daughter Elizabeth (who are the subscribing witnesses to the will), declaring in the paper that the estate intended in his expectancy, as heir to his mother and to his sister. The father, however, is to retain the use of the half so given jointly to his son and daughter, during his life, and after his death to be divided as above. This deed of gift bears date August 24, 1816, and is registered on the twenty-first of October, 1816, in the state of Tennessee, where all the parties thereto then and now reside.

Samuel Howard deposed that his impression is that, after the testatrix made her mark, he went into an adjoining room, and attested the will, said Alsey remaining in the other, and that she could not have seen him subscribe from her bed through the door of the room. This witness heard the argument of counsel at the trial in Jessamine, when the will was rejected, in which the necessity of a direct attestation in the presence of the testator was made.

Under the influence of communications made respecting this deed of gift, and others touching the questions which would be propounded, communicated to the attesting witness, Elizabeth, a few days before her second deposition was taken, at the instance of the heirs at law, she, by her deposition of the twenty-ninth of May, 1827, is made to answer that she does not

think she witnessed the will in the presence of Alsey Howard, and that she did not believe said Alsey to be of sound mind and memory when she signed the will. Upon cross-examination in this second deposition, she, however, again says she believed Alsey Howard to have had common sense; that Colonel Crockett wrote the will in the room where Alsey was; that said Alsey acknowledged it; that she, the witness, signed it also at that time, but whether at the moment of Alsey's acknowledgment, or whether she signed it in the room where Alsey Howard was or not, she can not say; she acknowledges that she had heard of the deed of gift to her from her father, but had not seen it, and that her brother, Samuel Howard, had a few days before read to her the questions which had been that day propounded to her on behalf of the opposers of the will.

From the testimony of Colonel Crockett, who is so far removed from all bias, and whose character is so pure, and from the first deposition of Elizabeth Howard, now Readon, the fact may be considered as established, that the attestation of herself and of Colonel Crockett was in the same room where the testator was lying in her bed. Her second deposition, even under all the circumstances under which it was taken, does not contradict that fact; that she does not know where she signed is all she will say, but says that the will was written in the room where Alsey was; she heard Alsey acknowledge, and saw her sign the will, too, and there was ink in the room. For what, then, should Elizabeth go out of the room to subscribe and attest? Colonel Crockett says the writing was all done in the same room where Alsey Howard was.

Sitting, as we do, as triers of the law and the fact, upon an appeal from the county court, we can not avoid finding the fact that the will was duly subscribed by the testatrix, in the presence of all the witnesses, and attested by two of them, yes, by all three, in the same room where Alsey Howard, the testatrix, was. The competency or incompetency of Samuel Howard is a question not worth adjudication, so far as it bears upon this controversy. The facts stated by him, under the acknowledged bias of his mind, many of which are not and need not be detailed, tend to confirm, and not to weaken, the testimony of Colonel Crockett and that of Elizabeth, so clearly given in her first deposition.

That an attestation in the same room with the testatrix is a sufficient subscription in her presence, is well settled by adjudged cases: *Sir George Sear's case*, cited and allowed in *Eccleston v. Petty alias Speke*, Carth. 81; *Davy and Nicholas v.*

Ann Smith, 3 Salk. 395; *Shires v. Glascock*, 2 Id. 688; S. C., Eq. Ca. Abr. 403, pl. 8; and others.

2. As to the sanity of the testatrix, Colonel Crockett proves she dictated the will; he saw nothing amiss; but had never conversed with her before or since. Elizabeth, another witness, proves she was in her usual state of mind, and she had common sense. But in her second deposition she says she does not think her of sound mind and memory, but again says she had common sense. That a person of common sense is not capable of making a testament, is a proposition which can not be admitted. The distinction between a person of sound mind and one of common sense is not perceived by the court.

The whole force of the testimony adduced to prove insanity, rests upon the statements of Samuel Howard, and of Elizabeth, in her second deposition; that Alsey was deformed; that she was so from her infancy; that, owing to bodily deformity and decrepitude, she never was sent to school; that she avoided the company of strangers, and had fits at times, are facts. But that her mind was not deformed, nor her affections benumbed, nor her intellect benighted, nor her reason sunk into chaos and confusion, are facts equally well attested. That she had common sense, that her intellect was of the common order of females, is well attested by many who knew her, conversed with her, and associated with her. She lived for very many years before her death and at her death in the county of Jessamine; she died at the age of fifty-three; yet, strange to tell, her sanity is questioned, and only two witnesses, Samuel Howard and Elizabeth Readon, of Tennessee, are found to give color to want of intellect, while those who knew her well, and resided near her in Jessamine, male and female, all concur as to her sanity. Her consciousness as to her deformity, and retreat from the approach of strangers is a proof of sanity; the testimony of Mrs. Pullen and Mrs. McGrath is full and clear as to her sanity; but no candid mind could hear the testimony of Mr. Taylor, and doubt. She informed him she had made her will; that she had bequeathed her whole estate to her mother, because she had been from infancy weak and decrepit, and her mother, with great care and pains, had nursed her from infancy to old age. This is surely proof, strong and undoubted, of memory, of reason, and of social affections and moral sense.

Under the proof offered by the heirs at law to counteract the testament, and destroy the execution of it, coming, as it does,

solely from two of the subscribing witnesses, under the circumstances detailed, and at the distance of twenty years after their attestation, it is proper to remark that such proof from the attesting witnesses ought to be received with great jealousy. In *Hudson's case*, Skinner, 79, cited by Powell on Devises, 708, the will was proved against the oath of two of the attesting witnesses, who would have destroyed its effect by swearing that the testatrix did not publish it, and that another guided his hand; yet upon the force of their signatures as witnesses and other circumstances, the will was established. In *Digges' case*, cited in Powell on Devises, 710, the person who wrote the will, and was an attesting witness, swore that the testator was of sound mind; the two other witnesses swore he was of unsound mind, but the verdict found the will a good testament. In *Lowe v. Joliffe*, Black. 365, the will was established, notwithstanding all the subscribing witnesses swore the testator was utterly incapable; to encounter this, other persons who were with the devisor on the day, two physicians who occasionally attended him, and several others, strongly deposed to the sanity of the testator. The jury brought in a verdict to establish the will. The testimony of the subscribing witnesses, as to the state of the testator's mind, at the time they were called in to attest, is not uncontrollable: Gilb. Rep. Eq. 264. In *Goodtitle on the demise of Alexander v. Clayton and others*, 4 Burr. 225,¹ the witnesses who attested the will were called to give evidence against their own attestation. Other witnesses were called to support the will. The whole court expressed their disapprobation of permitting witnesses to give evidence against the will, to which they acknowledged they had attested as subscribing witnesses. The court mentioned that there were several cases, both upon bonds and wills, where the attestation of witnesses had been supported by the evidence of other witnesses, against the attesting witnesses who denied their own attestations. Lord Mansfield, declared: "It is of terrible consequence that witnesses to wills should be tampered with to deny their own attestations."

From the whole evidence, the court is satisfied that the testatrix was of sound mind, and that the will offered for probate was published with the solemnities required by the statute.

It is, therefore, considered by the court, that the judgment of the county court be reversed; that the said last will and testament of Alsey Howard, deceased, be recorded in this court, and

1. *Alexander v. Clayton*, 4 Burr, 224.

that the original be certified to the said county of Jessamine as having been fully proved in this court, and to be there recorded, and that they take such further order thereupon as the law requires.

The appellant to recover his costs in this behalf expended.

See, as to what is sufficient publication of a will: *Sweett v. Boardman*, 2 Am. Dec. 16, note 20. As to burden of proving testator's insanity: *Jackson v. Van Dusen*, 4 Id. 330.

MCCURDY v. BREATHITT.

[5 T. B. MONROE, 282.]

PAROL EVIDENCE—MISTAKES, WHEN CORRECTED BY.—Parol evidence is admissible to correct a mistake in a written contract, when such mistake is caused by the artifice of one of the parties; and a contract so corrected may be specifically enforced.

APPEAL from the Logan circuit. Bill in chancery. The opinion states the case.

Mayes, for the appellant.

Crillenden, contra.

By Court, BISS, C. J. By articles of agreement between Cardwell Breathitt and James D. McCurdy, on the eleventh of January, 1818, the latter sold to the former a tract of land, for which Breathitt stipulated to execute four notes; three of three hundred dollars each, and the last of two hundred and eighty-seven dollars and fifty cents, payable in successive annual payments; the first to be due January, 1819, and so on. Instead of executing four notes, that part of the agreement was not carried into effect until the twenty-seventh of January, 1819, when the two first notes of three hundred dollars each were blended, and one note for six hundred dollars, payable first of January, 1820, was executed, and two others as before stipulated.

On the twenty-sixth of June, 1820, it was agreed between the parties that McCurdy should take back the land; that Breathitt should pay the balance due on the supposed first note of three hundred dollars, having paid thereof one hundred and sixty dollars; that he should pay sixty-two dollars and fifty cents to Mrs. Hunter, and should have the cedar standing on the land, within certain specified boundaries.

In reducing this contract to writing, Breathitt labored under

a mistake in supposing that the notes had been executed according to the original agreement, and that the first note was for three hundred dollars, instead of six hundred dollars.

McCurdy, perceiving that Breathitt was under that mistake, did not correct it, but, by artifice, drew the contract of 1820, binding himself "to give said Cardwell all the notes he received from him in a former contract for said land, except the first note;" in other respects the writing is drawn according to the agreement. Breathitt, under the mistake, and McCurdy not correcting it, but endeavoring to profit by his artifice, mutually signed the article so drawn. Breathitt paid up the money according to the contract of 1820.

But McCurdy afterward demanded payment of six hundred dollars, and, insisting on the mistake so committed, obtained a judgment at law. Breathitt exhibited his bill for relief against this mistake on his part, and artifice on the part of McCurdy, and by the decree of the circuit court obtained a perpetual injunction against the judgment at law, from which McCurdy has appealed.

The parol evidence was objected to, but the objection was not sustained below; and that question is again stirred in this court.

2. It is argued for the appellant that if the parol testimony should be thought competent and sufficient to prove the allegations as set up in the bill, yet the court should do no more than cancel the writing executed in 1820, and restore the parties to the state in which they were before that writing was executed, without enforcing the agreement of 1820, as claimed by the bill.

The questions as to the admissibility of parol proof to prove the mistake in the written agreement, and the propriety of rectifying the mistake, amending the writing, and decreeing specific execution of it, as so amended, were fully discussed by Chancellor Kent, in *Gillespie v. Moon*, 2 Johns. Ch. 593 [7 Am. Dec. 559], and the effect of the statute of frauds was considered. The cases upon these subjects are reviewed; many cases are cited of mistakes in bonds and other writings being rectified, and the writings amended and decreed as amended. Upon full consideration of these questions as to the competency of parol proof to establish a mistake in the written agreement, as to the effect of the statute of frauds, and as to the propriety of amending the writing by rectifying the mistake and decreeing specific execution according to the amendment, he gave relief upon parol proof against

the denial of the answer, by rectifying the mistake, and decreeing specific execution accordingly, on behalf of the complainant. The like determination was made in case of *Liggett's Heirs v. Ashley*, 5 Litt. 178.

The court is fully satisfied of the mistake and of the artifice by which Breathitt was induced to sign the agreement as drawn, and signed also by McCurdy, not fully expressing the true agreement. There is no positive inconsistency between the contract as proved and that contained in the writing, and the parol proof does not add a new and substantive stipulation not contained in the agreement, but only corrects that wherein Breathitt is by inference bound to pay more than he was to pay according to the agreement. It is rather expunging than adding a stipulation. It is correcting a mistake by which the writing, as drawn, is made to contain by inference more than the contract.

Decree affirmed with costs.

PAROL PROOF may be admitted to correct a mistake in a written contract: *Gillespie v. Moon*, 7 Am. Dec. 559; note, 567: *Chapman v. Allen*, 1 Id. 242. *Parsons v. Hosmer*, Id. 58; *Washburn v. Merrills*, 2 Id. 59.

GREATHOUSE v. BROWN.

[5 T. B. MONROE, 280.]

STATUTE OF FRAUDS—EXECUTION SALES.—It is not necessary that there should be an actual delivery, and change of possession of personal property sold under execution to render the sale valid; the publicity of the sale dispenses with the necessity of a delivery.

APPEAL from the Spencer circuit. Trespass. The opinion states the case.

Crittenden and Denny, for appellants.

By Court, BIBB, C. J. Brown declared against Greathouse and Carrico for trespass *vi et armis, et de bonis asportatis*; the defendants pleaded not guilty; the jury found the issue for the plaintiff, and assessed his damages at one hundred and twenty dollars, for which judgment was rendered. The defendants moved for a new trial, and assigned for cause that the verdict is against evidence; second, that the court misdirected the jury; the court overruled the motion.

In the progress of the trial the defendants took a bill of exception, which presents the only question in the cause; for

there is no exception to the opinion of the court upon the motion for the new trial, nor is the whole evidence stated.

The plaintiff Brown purchased the cattle and hogs at a public sale made at the instance of Carrico, by virtue of a distress warrant issued by a justice at the instance of Carrico against Stanley P. Gower. After this purchase Brown put the cattle into a pasture which he had previously rented of Gower, his brother-in-law, and employed Mr. Welsh, another brother-in-law, to salt the cattle for the plaintiff, Brown. Gower was about to move out of the county, but staid some weeks after the sale, and then did remove. During his stay, Gower's family milked several of the cows which were of the stock of cattle purchased by the plaintiff Brown, after the sale; Mr. Hardin advanced for the plaintiff the purchase-money.

The defendants gave in evidence a judgment in favor of Carrico, and an execution issued thereon and put into the hands of the sheriff subsequently to the former sale, made at the instance of Carrico, and purchase of Brown; which last execution Carrico caused to be levied upon the hogs and cattle formerly sold and purchased by Brown, under the distress warrant, and by force of this last execution the hogs and cattle were taken and carried away from the plaintiff.

The defendants moved the court to instruct the jury that if they believed that the hogs and cattle were left by Brown in the possession of Gower, it was a fraud in law, and they must find for the defendants; the court refused that instruction, but directed the jury that if they believed from the whole evidence that the purchase of the hogs and cattle by Brown was colorable and fraudulent, they must find for the defendants; to the opinion of the court in refusing to give the instructions as asked, the defendants excepted.

This court can not perceive any ground of just exception by the defendants below to the opinion of the court; it placed the cause before the jury upon the proper and only just cause for vitiating the purchase of Brown, and justifying the subsequent acts of Carrico, in causing the property to be seized in execution of his judgment. It can not be admitted as a legal proposition, that a purchase at public auction from an officer of the law, fairly and openly made, is rendered null and fraudulent because the purchaser leaves the property in the possession of the former owner. Such an open public purchase and transfer of property does not come within the reason of the case of *Hamilton v. Russell*, 1 Cranch, 309, and the cases decided upon

private sales between vendor and vendee. The publicity of the transaction divests it of its tendency to deceive others, and the court placed the subject upon the proper inquiry, whether the purchase by Brown was only colorable and to the use of Gower. But the court might have refused the instruction as a mere abstract proposition not bottomed on any color of evidence. The plaintiff, Brown, had put the cattle into a field which he had previously rented, and employed a person to look to them for him. The milking of some of the cows by Gower's family, not even proved to be by permission of Brown, was no evidence of a possession in Gower, whereon to ground the instructions moved.

Judgment affirmed, with damages and costs.

ELLIOT v. WARING.

[5 T. B. MONROE, 338.]

PARTIES—WHO ARE NECESSARY.—The assignor of a judgment should be made a party to a bill brought by an assignee against a husband to apply certain property to the satisfaction of the judgment; and when the property sought to be so applied is the wife's distributive share in her father's estate, she should also be a party.

HUSBAND AND WIFE.—At law, husband and wife are treated as one person, yet equity frequently treats them as different.

WIFE'S ESTATE—WHEN APPLIED TO HUSBAND'S DEBTS.—Equity will provide a sufficient maintenance for a wife and her children out of property descending to her during coverture from her father, before requiring such property to be applied to the satisfaction of the claims of her husband's creditors.

APPEAL from Woodford circuit. Bill in chancery. The opinion states the case.

Haggin and Loughborough, for appellants.

Wickliffe, contra.

By Court, **MILLS, J.** Waring, the appellee, filed these two bills, setting up two judgments at law obtained against Elliot in favor of other persons, and assigned by the plaintiffs therein to Waring after the judgments were rendered, and alleging that executions had been issued thereon, with returns of no estate, Elliot being insolvent. He also states that Elliot's wife's father had departed this life intestate, leaving a large estate, a great portion of which, both real, personal and slaves, had thus descended to Elliot in right of his wife; and that Elliot and his

wife, knowing that it would be subject to these and other judgments, had, a few days after the death of his father-in-law, united in a sale and conveyance thereof to her brother, the administrator of the father-in-law, and that the brother had executed his notes for three thousand dollars, the feigned price thereof, not to Elliot, but to Benjamin Taylor, as trustee for Mrs. Elliot and her children. He charges that this conveyance is fraudulent, prays that it may be set aside, and the estate subjected to his demands, which he held as assignee; or, if the conveyance was not fraudulent, his demands might be satisfied out of the price due from the purchaser to the aforesaid trustee.

Elliot answered that it was the intention of his father-in-law to give him no more of his estate, knowing his hopeless insolvency, and to settle whatever portion he designed for her in the hands of trustees for the use of herself and children; but he died intestate suddenly, without having made such disposition, and he, Elliot, knowing the intention of her father, executed the deed immediately after his death in conformity thereto, believing it an act of justice thus to place it beyond his own control, for the purpose of supporting his wife and children, who must otherwise come to want.

The trustee answered that he accepted the trust at the request of the parties, to hold the estate for Mrs. Elliot, and was not apprised of any fraud therein, and knew but little about any demands against Elliot. The purchaser did not answer.

The court below set aside the deed as fraudulent, and directed the judgments of the appellee to be satisfied out of the estate. If there was no other objection to this proceeding than the mode in which the decree is rendered, we should be compelled to reverse it. After setting aside the deed, without taking any account of the estate descended to Mrs. Elliot, or there being any part of the pleadings or exhibits showing what kind of estate it is, or in what it consisted, the court appointed commissioners, and licensed them by the decree to go and take the estate descended to Elliot in right of his wife, by that description only, and to sell so much thereof as would satisfy the demands of the appellee.

Without, however, dwelling on this point, there is a defect of parties to the bill. The original holders of these judgments still hold the legal title thereto; and judgments not being rendered assignable by law, the assignments only passed an equity to the appellee, and therefore, according to former

decisions, they were necessary parties to the suit, and ought to have been brought before the court previous to rendering any decree in favor of the appellee. But there is a more important party which ought to be made before any decree, and that is Mrs. Elliot and her children.

It is urged that she can have no interest therein, as the estate descended to her vested in her husband, and became liable to his debts. It will be found, however, that she has an equitable interest, which the chancellor will not fail to notice. It is certainly true that whatever chattels and slaves the wife may possess at her marriage, become the property of her husband on the marriage, and whatever comes or accrues to her during coverture vests in the husband, according to the course of the common law. But it is equally true that the chancellor will not lend his aid to enable the husband to get at the estate of the wife where he is not possessed, until he shall make for her separate use a suitable provision out of it. Though husband and wife are counted in law one person, yet equity frequently treats them differently; and there the husband may sue the wife, or the wife the husband, and they may be permitted, in certain cases, to sue and defend separately. While it is necessary for family government, and also to the relation to the rest of society in which the husband and wife may stand, that there should be but one will to govern, and one owner of property, yet there are great abuses, as well as hardships, growing out of that rule, which courts of law can not correct or relieve; and equity, therefore, will interpose and give redress. One of these hardships is the suffering of the wife and children from the imprudence of the husband; and equity will often relieve it by providing for the maintenance of the wife, especially out of an estate originally belonging to her in her own right.

It is evident in this case that there had been no distribution made of this estate to Elliott previous to the conveyance to the trustee for the use of the wife, and that is not pretended. The legal title, therefore, of the chattels and slaves was not in Elliot, and to get at them himself and recover them from the hands of the administrator, he would have had to have brought a suit in the name of himself and wife, and in such suit, though it had not been expressly asked by the wife, the chancellor might and would have directed a suitable provision for the wife and children by a settlement, before any decree would have been rendered in the husband's favor, and would, by the aid of a master, have fixed on the extent of this provision; *Oxenden v. Oxenden*,

2 Vern. 494; *Bosvill v. Brander*, 1 P. Wms. 459; *Jackson v. Williams*, 2 Id. 382¹; *Brown v. Elton*, 3 Id. 202; *Jewson v. Moulson*, 2 Atk. 417; *Grey v. Kentish*, 1 Id. 280; 1 Ves. 539; *Howard v. Moffatt*, 2 Johns. Ch. 206.

If this would have been done in the case of the husband's own application to the court of equity, so it would be done in the case of others claiming under him and applying to the court for redress. The only doubt in this case must arise from the circumstance of the complainant below being a creditor; and the inquiry is, whether a creditor, seeking to subject the estate coming through the wife, to the debts of the husband will be subject to the same rule.

This creditor had to come to a court of equity for redress; and as he does so, we will find the rule as to him is the same; for whenever such estate of the wife comes within the reach of the court, the same rule will be applied. It is true, family settlements made by the husband after marriage are generally void as to the creditors; but this will not hold always as to the estate of the wife, which the husband has never possessed, and on the credit of which the husband can not be supposed to have contracted; and this is more emphatically true with regard to an estate which falls to the wife during coverture by bequest or devise or by inheritance, especially when, by the imprudence or misfortunes of the husband, the wife and children are in danger of distress.

Equity in such case will not only refuse to bring the estate into the power of a creditor, who never could have trusted to that fund when he dealt with the husband, but has even sustained a bill in favor of the wife enjoining the proceedings of a creditor till she should have a reasonable provision made for her out of the fund: 1 Atk. 192; *Vandenanker v. Desbrough*, 2 Vern. 96; *Kenny v. Udall*, 5 Johns. Ch. 464; *Glenn v. Fish*, 6 Id. 38²; *Haviland v. Myers*, Id. 25; Id. 178³, and cases therein cited. In the case of *Kenny v. Udall*, the late chancellor of New York has reviewed the decisions of the British chancery with his usual ability, and has established his positions by precedent beyond controversy, and concludes thus: "If the wife's personal fortune be vested in trustees, or be in any other way under the control of the court, or placed within its reach, the court will not suffer it to be recovered until an adequate provision be made for her."

The case of *Haviland v. Myers* was a bill by the wife to enjoin

1. *Jacobson v. Williams*, 1 P. Wms. 382.

2. *Glenn v. Fisher*, 6 Johns. Ch. 33, 10 Am Dec. 310.

3. *Haviland v. Bloom*.

the creditors of the husband from proceeding against the personal estate of the wife; and in refusing to dissolve the injunction, the same chancellor uses these broad expressions: "The rule is settled by the cases referred to in the opinion delivered in *Kenny v. Udall*. And by the recognition in that opinion of the doctrine of those cases that the wife's equity to a suitable provision for the maintenance of herself and children out of her separate real and personal estate, descended or devised to her during coverture, is well established, and will prevail equally against the husband or his assignees and against any sale made or lien created by him, even for a valuable consideration, or in payment of a just debt. It was immaterial whether the suit in protection of that equity be instituted by the wife or by any other person in her behalf. It may be instituted, as in this case, by the wife against a creditor at law to restrain him from touching the property; and the equity may be extended if the circumstances of the case should require it, to the whole of the real and personal estate so devised or descended to the wife."

Whether the rule should be applied as broadly as here laid down, except to cases where the wife previously had a separate estate by an anti-matrimonial contract, we need not inquire. The authority is sufficient to show that Mrs. Elliot has, even by the complainant's own showing, a strong equity in the fund now in contest, not only to be heard as defendant, but that she, by her bill, or cross-bill, may controvert the complainant's right to a part or the whole of this estate; and that his right to come in at all must depend essentially upon the inquiry whether the amount descended to her is, or is not, a reasonable provision for the support of herself and children under the circumstances of the case; and the circumstances are the insolvent or hopeless condition of her husband, and his prudence in management, her prospects for support without this fund, and whether she has any other resources, the number of her children, and the amount necessary for her, and such like facts and circumstances attending the case.

It is unnecessary for us to say anything now on the merits of the sale made by herself and husband of the estate, as its merits may be a more proper inquiry on a final hearing, when all the parties are before the court. It might turn out that, if the sale was for the value of the estate, the chancellor might then let it stand, and secure enough of its proceeds for the wife, by properly vesting the fund for that purpose; for we are not pre-

pared to say on the glimpse of that sale which is afforded us, that it is fraudulent, especially as it was the sale of a fund which the wife had the right to have secured to her in part, at least, by application to a court of equity, that ordeal of fraud. Or, if it is for too little, and thereby the interest of the complaining creditor is injured, the court might direct the true value to be ascertained, and direct the transaction to be set aside in order that the creditor might come at the excess, if it shall turn out under all the circumstances of the case that the whole of the estate descended is an unreasonable provision for the wife and children. There is, however, an absolute necessity that Mrs. Elliot should be made a party, and be allowed to assert her rights before the estate is subjected to the demands of the creditor.

We can not help remarking that it is somewhat singular that the principles which we have now recognized should have heretofore been passed in our courts in such entire silence, especially as it might be expected that cases would frequently occur demanding their application; and there are but few principles of a court of equity, touching the domestic relations of society, better established, or more often recognized for more than a century past.

The decrees must each be reversed, with costs, and each cause be remanded, with directions to dismiss the bills with costs, and without prejudice to any future suit for the same cause, unless the complainant shall, in a reasonable time given, amend his bills and bring the necessary parties before the court.

EQUITY will compel settlement on wife: *Glen v. Fisher*, 10 Am. Dec. 210.

EVANS v. SMITH.

[5 T. B. MONROE, 363.]

SLANDER, WHO LIABLE FOR.—A person who repeats slander heard from others indorses it, and is liable therefor.

EVIDENCE—DECLARATIONS OF A PARTY WHEN ADMISSIBLE.—The declarations of a husband made pending an action for slander of his wife, that he believed defendant had not originated the slander, but only repeated the same, are admissible in mitigation of damages.

COMPROMISES, NEGOTIATIONS FOR, WHEN EVIDENCE.—Statements of facts, made in negotiations for compromises are admissible as evidence.

IMPEACHMENT OF A WITNESS.—Evidence of the general moral character of a witness is admissible for the purpose of impeachment, but evidence of particular instances of moral turpitude is not.

ERROR to the Madison circuit. **Action of slander.** The opinion states the case.

Beck, for plaintiff.

Turner, for defendant.

By Court, **MILLS, J.** Evans and wife brought an action against Smith for slanderous words spoken of and concerning the wife, which was tried on the general issue, and a verdict and judgment rendered for the plaintiff, to reverse which, this writ of error is prosecuted.

On the trial the defendant offered to prove that the male plaintiff had said, after the action brought, that he did not believe defendant originated the report against his wife, and that he had merely related what he had heard; but that it was necessary to sue somebody to stop the report. To this evidence the plaintiff objected, and it was rejected by the court, on the ground that this statement was made by the male plaintiff during an attempt to compromise the suit. That one who details slander, which he has heard from others, indorses it, so as to make himself liable to an action thereby, can not be denied. But it is equally true that barely stating what is told by others has not the stamp of malice so strongly imprinted thereon as original slander, and the circumstances may, therefore, be used in mitigation of damages. This action, it is true, was brought for the slander against the wife; but her husband is united in the action, and is entitled to the damages recovered; and the expressions offered in evidence as used by him, although they did not tend to show that the defendant was not guilty, yet they did conduce to show that he did not view the slander to be of such aggravated character as original slander would have been; and therefore the evidence was proper to have such weight as the jury might think it entitled to, in lessening the damages to be assessed by them.

The question remains, ought these admissions to have been rejected, because they were used pending a compromise? We think not. Offers of sums, prices, or payments, made during an attempt to compromise, if not accepted are not obligatory upon the party making them, and can not be given in evidence against him as proving his liability or fixing its amount, because he may make what offers he pleases for the purpose of buying his peace, without being prejudiced thereby; but if a party pending a negotiation for settling the suit, shall acknowledge or admit facts to exist touching the controversy, we are

aware of no rule which excludes such admissions as not good evidence against him. This distinction between the offers of terms pending such a treaty, and the admission and acknowledgment of the existence of facts, seems not to have been sufficiently attended to by the court below, in deciding this question. For the admission offered was certainly an acknowledgment of the existence of facts proper to be proved on the trial.

As the cause is to be opened for this error, we will notice another committed against the defendant which may again occur on a future trial of the cause.

The counsel for plaintiff asked a witness the following question: Is not the reputation of a female witness (naming her) introduced for the defendant, that of an unchaste woman? Has she not lived with a certain man as his wife four or five years, without having been married to him? This question was objected to by the defendant's counsel, but the court permitted it to be asked and answered.

It is decided that the general moral character of a witness may be proved either to corroborate or discredit him; but it is as clearly settled that, to discredit a witness, a party can not prove particular instances of moral turpitude, and the latter part of this question was evidently an attempt to do so, and therefore ought to have been excluded by the court.

The judgment must, therefore, be reversed, with costs, and the verdict be set aside, and the cause be remanded for new proceedings, not inconsistent with this opinion.

IMPEACHMENT OF WITNESSES—EVIDENCE OF CHARACTER WHEN ADMISSIBLE.—The credibility of witnesses is always in issue; and accordingly general evidence is receivable to show that the character which a witness bears is such that he is unworthy to be believed, even when upon his oath. Such evidence, to be competent, however, must be as to the impeached witnesses' general character or reputation in the community in which he has lived, for truth and veracity: *Bates v. Barber*, 4 Cush. 107; *Knobe v. Williamson*, 17 Wall. 586; *Atwood v. Impson*, 20 N. J. Eq. 150; *Simmons v. Holster*, 13 Minn. 249; *Boswell v. Blackman*, 12 Ga. 591; *Stokes v. State*, 18 Id. 17; *Smithwick v. Evans*, 24 Id. 461; *Pleasant v. State*, 15 Ark. 624; *Commonwealth v. Lawler*, 12 Allen, 585; Wharton on Evidence, secs. 562, 563. The reputation of a witness for truth and veracity is a question of fact for the jury, and the court should not make a preliminary examination as to the knowledge of witnesses called to testify to this fact. All witnesses, competent to give evidence of any fact in a case are competent to testify to the fact of reputation for truth; and the inquiry as to the amount and means of this knowledge is for the jury, in order to enable them to satisfy themselves as to the weight and importance of the testimony: *Bates v. Barber*, 4 Cush. 108.

EVIDENCE OF PARTICULAR FACTS OR PARTICULAR TRANSACTIONS are inadmissible for the purpose of impeaching a witness for the reason as stated by Best in his work on Evidence, vol. 1, sec. 256: "The exposing every man who comes into our courts of justice, to have every action of his life publicly scrutinized, would keep most men out of them. To admit character evidence in every case, or to reject it in every case would be equally fatal to justice:" *Newman v. Mackin*, 21 Miss. 383; *Taylor v. Commonwealth*, 3 Bush, 508; *Thurman v. Virgin*, 18 B. Mon. 785; *Rudedill v. Slingerland*, 18 Minn. 380; *Long v. Morrison*, 14 Ind. 595; *Shaw v. Emery*, 42 Me. 59; *State v. Bruce*, 24 Id. 71; *Root v. Hamilton*, 105 Mass. 22; *Foster v. Newbrough*, 58 N. Y. 481; *Southworth v. Bennett*, Id. 659; *Weathers v. Barksdale*, 30 Ga. 888. The doctrine of all the cases at the present day, although formerly there existed some diversity in the books upon the question, is well and accurately stated by McMillan, J., in *Rudedill v. Slingerland*, 18 Minn. 382. He says: "The only object in inquiring into the character of a witness is to ascertain whether his statements in themselves are entitled to credit; if he is a truthful person, they are, otherwise they are not. A witness, therefore, in coming into court would perhaps properly be considered as asserting his character for truthfulness to be good, and be charged with notice to defend it; but we are unable to see why a witness should be held responsible to answer for, or be required to meet an attack upon his character in any other respect. A man may indulge in vices which destroy his general character, yet his truthfulness and his reputation for truthfulness may be unimpeachable. An inquiry in such a case as to his moral character would mislead instead of assist in arriving at the object of investigation, namely, his credibility; it would in any event be an unnecessary attack and exposure of him to contempt and disgrace. Further, by such general inquiry as to character, the administration of justice would be hindered and delayed by collateral issues, and be more easily made the channel of venting private hatred and malice. For these, among other reasons, we think the better general rule is, that in impeaching the character of a witness, the inquiry in chief must be restricted to his credibility; that is, his general reputation for truth and veracity."

In conformity with the rule stated, evidence has been refused of declarations of a witness of his own want of religion: *Halley v. Webster*, 21 Me. 461. Evidence is also held inadmissible to prove the bad character of a female witness for chastity, or to show that she is a prostitute: *State v. Smith*, 7 Vt. 141; *Commonwealth v. Churchill*, 11 Metc. 538; *People v. Yelas*, 27 Cal. 630.

See, as to evidence of general character, in actions of slander: *Sawyer v. Ewert*, 10 Am. Dec. 633; in trespass: *Givens v. Bradley*, 6 Am. Dec. 646; in libel: *Stow v. Converse*, 8 Id. 189.

FARIS v. DURHAM.

[5 T. B. MONROE, 397.]

FRAUDULENT JUDGMENT—WHO MAY ATTACK.—In an action by a creditor, to set aside a deed as fraudulent, the grantee therein may show, although his deed is fraudulent as to creditors, that the complainant's judgment was obtained by fraud and artifice practiced by him upon the grantor.

ERROR to the Green circuit. Bill in chancery. The opinion states the case.

Mayes, for appellant.

Crittenden, contra.

By Court, OWSLEY, J. On the twenty-eighth of March, 1817, Meredith Compton executed a bond to Joshua Faris for six hundred dollars. Suit was afterwards brought by Faris upon the bond, and judgment recovered against Compton for principal and interest. Upon the judgment, execution was sued out against the estate of Compton, but the amount thereof was not made by the sheriff to whom it was directed.

Faris then exhibited his bill in equity, for the purpose of setting aside three deeds of conveyance, made by Compton to James Durham, for all his slaves and personal property. The deeds all bear date the seventeenth of November, 1817, are referred to and made exhibits in the bill, and are alleged to have been made by Compton, with intent to defraud his creditors and prevent the collection of their just debts. Compton and Durham were both made defendants, and called on to answer the charges contained in the bill.

Compton and Durham both accordingly answered; but Compton afterward departed this life, and the cause was finally heard as to Faris and Durham.

In his answer, Durham denies that the deeds of conveyance to him were made by Compton, with intent to hinder or delay his creditors in the collection of their just demands, but charges that the deeds were fairly and *bona fide* made upon a valuable consideration. He also denies that Faris is a just creditor, but alleges that the bond upon which he recovered judgment was obtained from Compton through artifice and fraud. He states that in the absence of Compton, and without his knowledge or consent, Faris caused the bond to be written, and, by concealing its contents, procured it to be signed by Compton, under an impression and belief that it was a bond for a conveyance of land upon which he had settled Faris, who had married one of his daughters, and not a bond for money; that Compton afterward denied the validity of the bond, and, when the suit at law was brought against him, he filed a plea, in substance denying the bond to be his deed; but that after many continuances and long after the date of the deeds of conveyances to him, Compton was induced, through the further fraud and artifice of Faris, to withdraw his plea, and suffer judgment to be rendered against him for the amount of the bond and interest, etc. He alleges a combination between Faris and Compton to recover

the property conveyed by the latter to him and to divide the spoil between them. He insists that a court of equity should not lend its aid in favor of a claim such as that of Faris, originating in, and conducted throughout with artifice and fraud.

On hearing, the court below dismissed Faris' bill, and from that decree he has appealed. In the examination of this case, we have found nothing to approve in the conduct of either of the parties. Faris and Durham, who are sons-in-law of Compton, have both displayed an unworthy disposition to obtain from their old and helpless father-in-law, without valuable consideration, all his property and means of subsistence; and it would be difficult to decide which of them have employed the most artifice and adroitness to effect their object. But it is not by scanning the evidence to find out which of the two is most censurable that this contest is to be decided; they have brought their case under the consideration of the court, and it must be determined by those principles of law and equity, by which, in like cases, courts of chancery are governed.

Were we not at liberty to travel back and examine into the justness of the debt claimed by Faris, but bound to acknowledge him such a creditor of Compton as was designed by the makers of the law to be protected by the statute against fraudulent conveyances, we should have no hesitation in saying that the court below should have granted the relief sought in the bill; for the circumstance of three absolute deeds, each for separate parcels of property, and all comprehending the whole of his slaves and personal estate, having been executed by Compton to Durham at the same time, carries with it strong evidence of fraud, and when connected with the further circumstance of the property conveyed having, after the execution of those deeds, remained for several months in the possession of Compton, proves conclusively the deeds to be fraudulent and void as to such creditors of Compton as were intended to be protected by the makers of the statute against fraudulent conveyances.

But while we admit the deeds to be fraudulent as to such creditors, we are not prepared to concede that, according to the principles of law and usage of courts of equity, the defendant in the court below was not at liberty to raise the question, and the court bound to decide, as to the justice of the complainant's debt. It is not necessary to a decision of the present contest to say, nor would we be understood as saying, that a defendant, who holds property under a fraudulent deed, may protect his

possession by any and every possible objection to the fairness and justice of the complainant's demand.

The debt may, through the fraudulent participation of the debtor, have been contracted; and as he would not, in such a case, be relieved from the effects of his own fraud, we would not be understood to say that any other to whom he might afterwards make a fraudulent conveyance of his property, would be allowed to protect his possession of the property by showing the injustice of the debt. The fraudulent vendee takes the property *cum onere*, and can not occupy more favorable ground in defending the property from the claims of others than would his vendor.

But the injustice relied on by the defendant in this case, and that which we apprehend it was competent for him to urge in defense to the relief sought by the complainant, did not arise from any improper or fraudulent act of Compton, from whom the defendant obtained the conveyances. It proceeded from the fraud and artifice of Faris, in procuring the bond for six hundred dollars, to be executed by Compton, without his knowledge of its contents, and when, from the evidence in the cause, it is evident that he was under the impression and belief that he was executing a bond for the conveyance of land. This fraud undoubtedly vitiated the bond, and, if insisted on by Compton, would have formed a good ground in equity for relief against the judgment. It can not, therefore, be a violation of any principle of equity or law to allow the defendant who holds under the deeds from Compton, though he does not occupy the favored attitude of a *bona fide* purchaser, to avail himself, in defense of the property, of that equity which originated before he obtained the deeds, and which would, in the hands of his vendor, have been an effectual shield against the complainant's demand for relief.

The deeds, though fraudulent, are nevertheless binding between the parties; and were the defendant not permitted to avail himself of the equity which existed against the complainant's demand at the date of the deeds, it would be in the power of Compton, by indirect means, to overreach and do away the effect of those deeds, which, by legal operation, are binding upon him, and which, by no direct means, could be avoided by him.

The decree must be affirmed, with costs.

BABB, C. J., did not sit in this cause.

BROWN v. BEAUCHAMP.

[5 T. B. MONROE, 413.]

CHAMPERTOUS CONTRACTS—WHAT ARE.—Contracts to aid in defense of a suit, in consideration of money and a part of the land in the event of success, are champertous and void.

CHAMPERTY is a misdemeanor, and punishable by fine and imprisonment.

ERROR to the Washington circuit. **Action of covenant.** The opinion states the case.

Wickliffe, for plaintiff.

Haggin and Loughborough, contra.

By Court, **BISS**, C. J. Beauchamp sued Brown upon a covenant, by which it appears that the heirs of McCracken had instituted a suit for a tract of land which Benjamin Brown had conveyed to the defendant, William Brown; that the defendant had employed the plaintiff to attend to the defense of the suit so instituted by McCracken's heirs, and if Beauchamp should compel the said heirs to center the improvement on which their claim depended, Brown to pay Beauchamp one hundred dollars, if not, nothing; and if Beauchamp defeated the claim of the heirs, then Brown to give Beauchamp one half of all the land within Brown's patent above where McCracken's lower line would come to, if the improvement was centered, besides the one hundred dollars.

The declaration averred that, by the decision of the court of appeals, the claim of McCracken's heirs was declared invalid, and demanded the money, but not the land, according to the stipulations in the covenant.

The defendant demurred to the declaration, and his demurrer was overruled; he pleaded that Beauchamp, at the date of the covenant, had not any interest in the controversy with McCracken's heirs; that he was not an attorney or counselor at law, at, or before, or since the said covenant, and that the said covenant was contrary to the laws against champerty and maintenance, and void; to this the plaintiff demurred, and his demurrer was sustained.

The defendant also pleaded that Beauchamp had not performed the covenant on his part; to this the plaintiff demurred, and his demurrer was sustained.

The plaintiff has judgment according to the assessment of the jury upon a writ of inquiry, for the money and interest,

amounting to one hundred and twenty-five dollars and sixty-seven cents.

Upon the pleadings the judgment should have been for the defendant, Brown, because the contract was for maintenance and champerty.

Maintenance signifies an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. It is divided into two classes: 1. *Ruralis*, or in the country, as where one assists another in his pretensions to certain lands, or stirs up quarrels and suits in the country, in relation to matters wherein he is no way concerned; 2. *Curialis*, or in a court of justice, as where one officiously intermeddles in a suit depending in any such court, which no way belongs to him, by assisting either party with money, or otherwise, in the prosecution or defense of any such suits. Of this second class of maintenance there are three species: 1. Where one maintains another in his suit, without any contract to have part of the thing in suit, which generally goes under the common name of maintenance; 2. Where one maintains one side, to have part of the thing in suit, which is called champerty; 3. Embracery, as where one attempts to corrupt, or influence, or instruct a jury; or in any way to incline them to be more favorable to the one side or the other, by money, letters, promises, threats or persuasions, except only by the strength of evidence and the arguments of counsel in open court at the trial of the cause; so, also, by laboring a juror to appear and act according to conscience, or by indirect means, as where persons procure themselves or others to be sworn on a jury to serve the other side: 1 Hawk. P. C., c. 83, 84, 85, pp. 535-552; 2 Inst. 212, 213; Co. Lit. 368; 1 Sand. 301.

The covenant in question falls directly within the first and second species of unlawful maintenance of a suit in court, that is to say, within simple maintenance and champerty; for the plaintiff in this action not only undertook to manage and assist in the defense of the suit of McCracken's heirs against Brown, and to uphold Brown in that suit, but was, in the event of success, to have a part of the land in controversy.

“Maintenance is an unlawful upholding of the defendant or plaintiff, tenant or defendant in a cause depending in suit by word, writing, countenance or deed:” 2 Inst. 212.

Maintenance, commonly so called, may be by assisting another with money to carry on his cause, or otherwise bearing him out in the whole or a part of the expense of the suit; or by one who,

by friendship or interest, saves a party that expense which he might otherwise be put to, or but endeavors to do so. And all such persons as give, or but endeavor to give, any kind of assistance to either of the parties in the management of the suit depending between them, are guilty of maintenance: 1 Hawk. P. C. c. 83, secs. 4, 5, 6 and 7, pp. 535 and 536.

Champerty is the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it: 1 Hawk. P. C. 545; Co. Lit. 368. Every champerty is maintenance, but every maintenance is not champerty; for champerty is but a species of maintenance, which is the genus: 2 Inst. 207.

In the definitions of maintenance and champerty, it is to be observed that the unlawful intermeddling or upholding constitutes the offense. For some acts of assistance and upholding are justifiable by reason of consanguinity, or affinity, or of interest, or of the relations of landlord and tenant, master and servant, neighbor and neighbor, attorney or counsellor and client. The acts which may or may not be justified by reason of any of these relations, are measured and graduated according to those relations respectively, as will be seen in 1 Hawk. P. C. c. 83 and 84.

But the plaintiff here, from the pleadings in the cause, has no pretense or color of justification by reason of consanguinity, affinity, or interest, or other of the relations recognized in law as justifying any kind of upholding or intermeddling with the suit referred to in the covenant. The covenant sued on was a contract and agreement for unlawful maintenance and champerty.

All these species and classes of maintenance are offenses at common law. They are strictly prohibited and denounced as contrary to sound policy, the peace of society, and the safe administration of impartial justice, having a manifest tendency to oppression, by encouraging and assisting persons to persist in suits which perhaps they would not venture to go on with upon their own bottoms in prosecution or defense. They tend to prevent the observance of the golden rule and sacred advice: "Agree with thine adversary quickly, whilst thou art in the way with him." Maintenance is *malum in se*, and against the common law and statutory provisions in aid of the common law: 2 Inst. 212; 1 Hawk. P. C. c. 83, sec. 36, p. 543; 1 Dig. Laws Ken. chap. 37. "*Culpa est in immiscere rei ad se non pertinenti; pendente lite nihil innovetur.*" "It appeareth that the end of

champerty and maintenance is to suppress justice and truth, or at least to work delay, and therefore it is *malum in se*, and against the common law:" 2 Inst. 208.

All offenders of this kind are not only liable to action at the suit of the party aggrieved, but may also be indicted as offenders against public justice, and upon conviction, may be fined and imprisoned according to the circumstances of the offense. Contracts founded on any of these species of unlawful maintenance are void.

The judgment upon demurrer should have been for the defendant below.

It is, therefore, considered by the court that the judgment be reversed, and the cause remanded to the circuit court, with directions to enter judgment for the defendant in that court upon the demurrer.

Plaintiff in this court to recover his costs.

MORRISON v. CALDWELL.

[5 T. B. MONROE, 426.]

TITLE ACQUIRED SUBSEQUENT TO CONVEYANCE INURES TO WHOM.—Land acquired by a grantor subsequent to his conveyance of the same to different grantees inures to the benefit of the first grantee, and is not liable for the debts of the grantor.

TRUSTEE, WHEN ESTOPPED FROM ASSERTING AN OUTSTANDING TITLE.—A trustee can not acquire for his own benefit an outstanding title to the trust property, and a conveyance with warranty against his grantor, will estop the trustee from asserting a claim to the trust property acquired at an execution sale against his grantor.

ESTOPPEL.—A person ignorant of his claim to property, is not estopped from subsequently asserting it, although he stands by and sees the property sold as that of another.

SPECIFIC PERFORMANCE, WHEN REFUSED.—A decree for a proper deed will be denied, unless it appears that a proper deed was prepared and presented to the grantor, and that he refuses to execute the same.

APPEAL from the Fayette circuit. Bill in chancery. The opinion states the case.

Crittenden, Chinn and Wickliffe, for appellants.

Haggin and Loughborough, contra.

By Court, MILLS, J. David and Levi McMurtry, being seised in fee of a tract of land containing about sixty-five acres, in the year 1810, contracted by parol only to sell it to Lewis Sanders, who paid them part of the price. But the whole price was not

paid till the twenty-seventh of June, 1815, when they sealed and acknowledged a conveyance for the same, which was duly recorded forthwith. The deed bears date on its face on the twenty-eighth of November, 1814, but the acknowledgment twenty-seventh of June, 1815, when, as is contended by the complainants in this controversy, it was first signed, sealed and delivered, and parol proof is adduced to show that such was the fact.

Sanders, to secure sundry debts due the late Kentucky Insurance Company, conveyed a part of the same land, together with an adjoining piece, to James Haggin and Thomas T. Crittenden, in trust to secure the payment of these debts with a full power to sell in default of payment. This conveyance in the body of it bears date on the sixteenth of February, 1814, and concludes thus: "In testimony whereof the parties have hereunto set their hands and affixed their seals this sixteenth day of February, 1815," and then follows the seals and signatures of the parties. On the twenty-eighth of March, 1815, this deed was duly acknowledged and recorded in the proper office.

On the fifteenth of June, Sanders, to secure sundry debts due by him to the Bank of Kentucky, conveyed sundry tracts of land to said bank, and among the rest the aforesaid tract conveyed to him by McMurtry, and interfering with, and extending into, the first aforesaid tract conveyed to the insurance company to the extent of about thirty acres; and this collision between these two deeds has given rise to the present controversy, as that interference is the matter of dispute. This deed to the Bank of Kentucky was not acknowledged and recorded till the twenty-ninth of October, 1817, upward of two years after its date.

From this clashing of conveyances arose two different claimants, from the two banks down to the present parties. Haggin and Crittenden, the trustees for the insurance company, sold and conveyed to James Prentiss by deed dated the twenty-fourth of November, 1817; Prentiss conveyed in trust to Pearson, Scott, and January, who sold and conveyed to James Morrison, who devised the tract to Robert Scott, who is a defendant in this suit.

On the other hand, the Bank of Kentucky proceeded to foreclose her mortgage on all the large estate conveyed to her by Sanders, including this thirty acres among the rest, and sold it and became herself the purchaser. But this sale did not nearly discharge the debt of Sanders to the bank, and there was a

number of collateral sureties bound to the bank for the debt of Sanders, who were much dissatisfied with the sale of the bank under its mortgage, and who prevailed with the bank again to set up the same estate at auction, in order that they might attend to the sale and cause it to bring a better price, they engaging to make up and pay the deficit, as Sanders had failed. In the meantime executions of others had been levied on this estate so conveyed to the Bank of Kentucky, and the estate had been sold thereby, and James Haggin had become the purchaser of part, and James Cowan of another part, to whom the sheriff conveyed. This title was supposed to be dangerous to the title of the Bank of Kentucky, because the mortgage to the bank from Sanders had not been recorded in time, whereby the estate was believed to be liable to the judgments and executions of creditors. In order to obviate this difficulty, and to cause the estate in this second sale to bring as much as possible by removing incumbrances, it was agreed between the bank and these collateral sureties that the bank should purchase in the title of Haggin and Cowan, acquired by the sheriff's sale before the estate was resold. This was accordingly done, and the Bank of Kentucky again set up the estate for the benefit of these sureties, at auction. At this sale, Caldwell, the present complainant, became the purchaser of a tract which included this thirty acres, the matter of controversy, then claimed and held in the possession of Morrison. Caldwell accordingly gave bond with surety to the bank for the purchase-money, and received a conveyance.

Caldwell then filed his bill, making the Bank of Kentucky and Morrison, in his life-time, defendants; complaining first against the bank, that the conveyance which they had given him was not valid, because it was made by an agent of the bank, and had not the corporate seal affixed thereto; that it did not contain such clauses of general warranty as it ought to have done under the terms of the sale, and that the bank had never given him possession, but Morrison still held possession of this thirty acres. As against Morrison he alleges that the conveyance from McMurtry to Sanders was antedated, and that Sanders, of course, had no title when he conveyed to the insurance company, under which he held, and, of course, that company took no title, that the conveyance to the insurance company was dated a year before it was recorded, and of course, it was invalid as to creditors and subsequent purchasers without notice: and that the Bank of Kentucky, under which he claimed,

was such purchaser without notice; or if the Bank of Kentucky got no title, and her conveyance was not recorded in time, then the executions of the other creditors took the estate, and Haggin, the purchaser under them, acquired a good title, and the Bank of Kentucky having acquired this title before his purchase, of course their title was superior to Morrison's. He prays that the bank may complete his title, by making it as it ought to be; and that Morrison may be compelled to release his title and to surrender the possession and account for the rents and profits; or if this prayer should not be granted, that he may have relief granted him against the bank to the extent of the purchase-money for the thirty acres.

The bank answered, alleging that the conveyance received by the complainant was received by him without objection, and his notes given for the purchase-money; that they were, however, willing to make him a conveyance with the seal properly annexed, if it was not already done, so soon as he would present to them a proper deed. They deny that they were to make any warranty by the terms of the sale, but only to convey their title; that they were not to deliver possession; that the complainant knew of Morrison's title before he purchased, as Morrison proclaimed it at the sale, and particularly advised the complainant not to buy the thirty acres, as he, Morrison, would contend for it; that the sale was not for their benefit, nor were they interested in it, but that it was merely for the benefit of the collateral sureties of Sanders.

Morrison having departed this life, his executor and devisee responded to the suit. The executor alone answered the original bill setting forth the title of the testator as we have already recited it. He denies any fraud in the deed from Sanders to the insurance company, and insists that the last date at the bottom is the true date; that the date in the body of the conveyance was owing to the conveyance having been prepared before it was executed, or by a mistake of the writer, who had put in the old year instead of the new, as frequently happened at the commencement of a new year, as this date was; and that the date at the bottom is the proper corrective. He insists that it is incompetent for Sanders, or the McMurtrys, or any other person claiming under them, to contradict or disprove the date of the conveyance from the McMurtrys to Sanders, as the conveyance was recorded in due time; or if it is, that there was the same absence of title in Sanders when he conveyed to the Bank of Kentucky, that there was when he conveyed to the insurance

company; and that, as the former was not recorded in due time, Morrison had the superior equity; and that the conveyance of McMurtry, when made, inured to the benefit of the trustees of the insurance company, and therefore Haggin could not acquire title by the sheriff's deed.

The complainant then filed an amended bill setting up additional and new equity against the title of Morrison. He charges that Morrison was one of the collateral sureties for Sanders, and was party to the arrangement and agreement made between said sureties and the bank, in pursuance of which the estate mortgaged by Sanders to the bank was brought into market a second time. That that agreement was in writing, and signed by Morrison for himself, and by James Haggin for the other sureties, and is to this effect:

"It is agreed between the Bank of Kentucky and James Morrison and others, collateral securities for Lewis Sanders, as followeth, to wit:

"1. The bank will pay Haggin and Cowan the amount of their purchase-money, at the sale of the property embraced in the deed of trust made by the sheriff to them respectively, with interest.

"2. The collaterals will obtain a relinquishment or conveyance from Haggin and Cowan respectively to the bank of their right as acquired at such sale.

"3. The bank shall sell, at as early a day as convenient after the tenth day of July next, the estate conveyed by those deeds of trust as aforesaid, upon a credit of one, two, and three years equal installments, payable in notes on this institution, or of the commonwealth, agreeable to the provisions of the deeds.

"4. The amount of the sales so made shall be credited upon the two notes, one of twenty-four thousand dollars, the other of twenty-six thousand dollars, in proportion to their original amount, as though paid when those notes were protested.

"5. The collaterals jointly or severally, or some of them, will secure to the bank the balance of the original amount of those notes, with interest on such balance from the date of protest, payable in one, two, and three years, from the date of the sixteenth of July, by notes of that amount, with interest, with security or a lien on property satisfactory to the bank.

"6. Those so securing the institution shall be permitted, at their own cost, to prosecute for their own benefit, the indorsers of Sanders upon the notes aforesaid, and the obligations of any

collaterals who may prove delinquent, without responsibility on the part of the bank upon any event.

“7. The president and cashier of the Lexington Branch Bank, and Benjamin Gratz, are authorized, on the part of the bank, forthwith to consummate this arrangement, by receiving notes and securities from the collaterals, giving a receipt of the terms on which they are to be held, passing an order for the cancellation of the bonds of the collaterals who shall comply with the terms aforesaid, receiving the relinquishment or conveyance of Haggin and Cowan, and paying the amount of purchases aforesaid. The arrangement, so far as respects the matters previous to the sale, shall be fulfilled within fifteen days from this date or time. It is understood that the bank is not bound to sell to any who shall not sufficiently secure the price.”

This agreement was signed by the officers of the bank, and by James Morrison and James Haggin, on behalf of the collaterals. Also, to complete this arrangement, the officers of the bank drew up the form of a notice, or advertisement, of the contemplated sale, expressing on the face: “The Bank of Kentucky will convey the title invested in them by the trust which is deemed unquestionable.” This form of advertisement was presented to Morrison and Haggin, who acted for themselves and the other collateral sureties, and they indorse on it as follows, subscribing their names thereto. “The within advertisement for the sale of property, contemplated in the compromise between the Bank of Kentucky and the collateral sureties of Lewis Sanders, meets the wishes and views of the parties.” This indorsement, however, seems never to have been published with the advertisement. It is insisted, however, in the amended bill, that Morrison, having entered into this arrangement, and remaining silent about his own claim to the thirty acres in contest, and uniting in imposing upon the world a belief that the title was good, can not be permitted to claim or assert his title against a purchaser under that arrangement and sale, as the complainant is, and that he accordingly ought to be compelled to release.

To this the executor and devisee of Morrison answered, that although Morrison was a surety of Sanders, and party to this arrangement, and had been silent about his own title to the thirty acres, yet he ought not to be prejudiced by any of these acts, because he was ignorant at the time that the two conveyances of Sanders to the insurance company and the Bank of Kentucky in any manner interfered; or that this piece of land,

which he then claimed and held in possession, was in any manner covered by the deed to the Bank of Kentucky, and for this reason alone he was silent; and, of course, nothing was said about his claim to the thirty acres, nor was it merged into this agreement, or excepted out of it. But that so soon as he discovered the interference, and that this thirty acres was to be sold with an adjoining piece, he asserted and made public his title to all the purchasers on the day of sale, and particularly to the complainant, and warned him not to purchase, and assured him that he, Morrison, would defend his title and possession at law to the utmost; and therefore the complainant could not claim to be a deluded purchaser by the acts of Morrison, nor could he claim that he expended his money under the connivance of Morrison, but that he was anxious for the land, and bought it at a risk with a design to hold it by the force of his title.

The court below dismissed the bill as to the Bank of Kentucky; but decreed that the devisee of Morrison should release his title to the complainant, and surrender the possession of the land, and that the executor of Morrison should pay the rents thereof since the purchase by the complainant.

From this decree the executor and devisee of Morrison have appealed.

We shall first examine the claims of the parties as litigated in the original bill, and ascertain who held the real title at the time of this arrangement between the Bank of Kentucky and the sureties of Sanders. For it is evident that if either the bank or James Haggin, under the sheriff's sale, then held the real title, the complainant must be invested with it, or the bank must be bound to make it to him. On the contrary, if Morrison then held the estate, the question can then arise, how far he embarrassed it by this agreement. In determining this question, much must depend on the conveyance from Sanders to the trustees of the Kentucky Insurance Company, which was the first made by him. We can not perceive any difficulty in the date of this deed. It is true that the date written in the body of the deed is exactly one year before the date written at the foot thereof; and as these dates disagree, one or the other must prevail as the true date. That written at the foot of the instrument is specially annexed as the day on which the deed was sealed; and taken in connection with the acknowledgment of the deed, for the purpose of recording it, we can not hesitate to give it the preponderance over the date written in the body,

which seems to have been very probably a mistake of the draftsman in the year in which he was writing. Giving this construction to the dates as they appear on the instrument, this conveyance appears a good one, and is recorded in due time, and must stop Sanders, and those claiming under him, from questioning it, as there is no circumstance of fraud proved as attending it.

The question next succeeds as to the effect of this deed being made when Sanders had no legal estate; for the grantors in the deed of McMurtry to Sanders both depose that they never executed it till the day of the acknowledgment, which is the twenty-seventh of June, 1815, instead of the twenty-eighth of November, 1814, the date written on its face. It is insisted on the part of the defendants, that as this deed is acknowledged in due time by the grantors, and recorded, neither they nor any person claiming under them can be allowed to disprove the date; while on the other hand, it is contended that it is competent to prove that the deed was delivered on a different day from its date. As this deed is acknowledged as it stands before the proper authority, the question whether a different date can be proved from that acknowledged is somewhat different from the question whether a different day of delivery from that stated in the deed can be proved. But we need not decide it now. For, take it either way, precisely the same consequences will follow in the present controversy. For, if the deed is to be taken as of the date written on its face, then the title of the trustees of the insurance company is unquestionable; because Sanders, possessing a legal estate by deed recorded in due time, conveyed it to those trustees by deed properly recorded. Of course, nothing was left for Sanders to convey to the Bank of Kentucky by his subsequent conveyance, and Morrison, claiming under the first deed, took an indisputable estate. On the contrary, if the parol testimony is admitted, and the deed is to be held as a deed of the twenty-seventh of June, 1815, then when Sanders conveyed to the Bank of Kentucky, under whom the complainant claims, on the fifteenth of June, 1815, there was the same absence of title in him then that there was when he conveyed to the insurance company, which placed their deeds on a par, except that the one to the insurance company was the eldest and recorded in proper time. It has been often held by this court that where a person conveys and warrants, and has no title, and afterward acquires title, this after-acquired title inures to the benefit of, and passes to his alienee: *Massie v. Sebastian*, 4 Bibb, 433; *Aldridge v. Kincaid*, 2 Litt. 390. And in case of two convey-

ances by him when he had no title, we can have no hesitation in saying that the title inures to the benefit of and passes to the first grantee, if he be a fair purchaser. According to this doctrine, when the McMurtys conveyed to Sanders, the trustees of the insurance company took the estate and left nothing for the Bank of Kentucky, and Morrison claiming under the former deed, took the estate immediately from it.

The remaining question on the title of the parties is, what effect the sale and conveyance of this estate to Haggin, under the judgments and executions against Sanders took upon the estate. This sale was after both of the conveyances from Sanders to the trustees of the insurance company, and that to the Bank of Kentucky, and also subsequent to the deed from the McMurtys to Sanders, and before either of the trustees of the insurance company or the Bank of Kentucky had disposed of their respective claims. In this situation we can not decide that these judgments and executions could or did reach or pass the estate in these thirty acres to Haggin. For although they could take and sell all the estate which Sanders held in the lands, and which he had not conveyed away by deed recorded in due time, yet we have seen that his conveyance to the trustees of the insurance company was recorded in due time, although that to the Bank of Kentucky was not; and although this former deed should be held according to the parol proof, to be made previous to his having title, yet still as by the doctrines of the common law, this subsequently acquired title inured to the benefit of his previous grantee, we can not conceive that the legislature in subjecting lands to the payment of debts, meant to disturb this wholesome provision of the common law, and to subject such after acquired estates to seizure and sale, to the prejudice of the first grantee, by fair title of record; of course, the title of the trustees of the insurance company was not affected by this sheriff's sale.

But if in this we should be mistaken, there is another reason why this sale by the sheriff could not operate to the prejudice of the trustees of the insurance company. Haggin, who was the purchaser under the execution, was also a trustee of the insurance company, and was not permitted by law, if he had been so disposed, to do anything to the prejudice of the *cestui que trust*, or to acquire titles to the trust-estate in his individual character, to the injury of the trust.

If he did acquire such, they inured to the benefit of the trust. After making the purchase under the execution, he conveyed,

jointly, with his co-trustee, to Prentiss, under whom Morrison holds by a deed with warranty, against all claiming under Sanders. This was sufficient to pass the estate acquired by executions, or to estop those claiming under him from asserting his title against the trust. Thus his title acquired by sheriff's sale, such as it was, passed to Morrison. It is true he afterwards released his title by way of quitclaim to the Bank of Kentucky, to the whole estate acquired under the execution, including this thirty acres with the rest; but although this was all done, and that without his knowing or suspecting that there was an interference between the two conveyances for the use of the two banks, yet the latter release could not pass the title to the Bank of Kentucky, because of the prior deed, as trustee of the insurance company, to Prentiss. The conclusion, therefore, is, that Morrison held a complete title, and the complainant has no title, unless he has derived an equity against Morrison, arising from his acts in the arrangement with the Bank of Kentucky.

It is almost certain that Morrison, by his silence with regard to his own title, during all the arrangement with the bank, and in providing for the sale of the estate, including these thirty acres, was guilty of no duplicity or actual fraud. The conveyance to the trustees of the insurance company was of a tract of about eighty-four acres, entirely confined to the north-east side of the road from Lexington to Georgetown. The conveyance to the Bank of Kentucky was of a large estate of several tracts, and, among others, a tract on the opposite side of said road, but it ran over and included this thirty acres on Morrison's side, out of eighty-four acres which he claimed, and it is not easy to ascertain from the conveyances that there is any interference by inspecting the face of them. It perhaps might be ascertained, by plotting the notes of each; but it is not certain that it could without actual survey. Morrison was, therefore, ignorant of the interference at the time, as were all the parties, and did not know that he was putting some of his own land then in his possession into the compromise. It was not one of those claims that the parties stipulated to extinguish, and Morrison could have no motive to conceal his claim and jeopardize his title. Indeed, he had every motive to disclose his interest; for if he lost his title by his silence, he would exactly pay that amount more than his proportion as one of the sureties of Sanders, for which he could have no redress. Indeed, all the parties at that time appear to have been ignorant of the fact

of this interference. The contract is silent respecting it. If it had been known, it was the interest of all to provide against it. As to constructive notice, it could not operate upon Morrison. That notice given by the recording of conveyances does bind a person to look for previous grants interfering with him, but not to examine subsequent ones, which could not be supposed dangerous. He had the oldest recorded conveyance, and might be told that Sanders, who held adjoining lands, had conveyed them to the Bank of Kentucky, and he might be shown the deed without being led to suspect that it interfered with the prior conveyance; and if he read the deed, he might not be able to perceive it. Constructive notice, therefore, operated not against, but in favor of Morrison. He held the oldest conveyance, and the possession of which the bank, when making this arrangement, was bound to notice. As he was not bound to know of this interference, and did not, in fact, know of it, as is evinced from the circumstances of the case, the question turns upon the effect that this ignorance ought to have in his favor. The principle that one who stands by and sees another spend his money, and induces him to do so, for property to which he has a claim, shall not be permitted to assert that claim thereafter, or shall be compelled to surrender it in favor of the deluded purchaser, we grant is a strong one, frequently enforced by upright chancellors, and often by this court; but the punishment of fraud is the foundation of the rule, and that not constructive or legal, but actual fraud. The *quo animo* must be inquired after. In short, the silence of acts done by such a bystander, which deludes the purchaser, must be of a culpable character, and such as leads the chancellor to reach and charge the conscience of the offender; and unless this can be done, we know of no case where the chancellor has enforced the principle. Here, then, is Morrison deceived, mistaken and ignorant, when he entered into this arrangement; and the purchaser under the arrangement, who complains that he has been deceived of those acts of Morrison, when he did not intend it. Which of the two shall lose, the party who has a valid title, or he that bought an invalid claim? Equity will permit him who has the title and possession to keep them still.

But we can not say that the complainant here does stand on equal grounds, in this respect, with Morrison, who disclosed his claim at the sale, and forewarned him of his danger before he had expended one cent of his money. He hesitated and heard the opinions of others who condemned Morrison's title;

and it is clear he rested on them and run the risk, and did not rely on any obligations to convey the title which Morrison may have been supposed to have come under by his unsuspecting and innocent silence in his arrangements with the bank. Relying on this is evidently an after-thought, found out and set up long after filing his original bill. It has been urged that this forbidding of the sale by Morrison came too late, and that he was not at that hour at liberty to retract, after he had brought the bank into the arrangement, and purchasers at this sale had a right to claim the rights of the bank. This might be true, if he had knowingly or intentionally deceived the bank previously; but this we have seen he did not do. We do not perceive how the bank can complain. She had no title to this land before the arrangement, and she therefore lost nothing; nor do we see how the collateral sureties of Sanders, as has been urged in argument, are injured or defrauded by this act of Morrison. If the complainant does not gain this land, these sureties will have the precise sum to pay in the deficit which they would have had if Morrison had disclosed and excepted his title in making this arrangement, and not one cent more. On the contrary, if Morrison should lose, he would pay the value of this land more than the rest.

Besides, it is necessary to first ascertain whether the complainant is entitled to an abatement with the Bank of Kentucky, for the price of this thirty acres, so as to charge the securities with it before they can complain. This forms the remaining question.

It is clear that the bank did not agree to warrant the title. Their advertisement did not promise a warranty, but only the title conveyed to them by Sanders; and it is in proof that their terms of sale were read on the day of sale, before the sale of every particular piece of property, explicitly announcing that they parted with their title only. The bargain of the complainant was, therefore, a risking one. In the same purchase he got other lands in which there is no dispute, and which may probably be worth all he gave for the whole; and it is worthy of remark, that he not only run the risk of Morrison's title, when warned of it before he bought, but since, in his bill he has said nothing about a rescission of contract. He still claims to retain the undisputed part. As against the bank, therefore, he is entitled to no redress by the abatement of the purchase-money.

It is true his deed is not, as it ought to be, under the seal of the corporation; for the agent, instead of affixing the corporate

seal of the institution, has only affixed his own seal; but as he has accepted this conveyance, and has not prepared another, and applied to the bank to execute it properly, which the bank expresses a willingness to do, it will be time enough to grant him redress when they refuse.

The decree must, therefore, be reversed, with costs, and the cause be remanded, with directions to the court below to dismiss the bill, with cost.

MITCHELL v. VANCE.

[5 T. B. MONROE, 528.]

INDEMNITY—OFFICER WHEN ENTITLED TO.—When a jury, called by a claimant to property seized under execution, fails to find a verdict, the officer is not entitled to indemnity before selling, and a bond so given to indemnify him is without consideration and void.

PROMISES TO OFFICERS, to induce them to perform the duty required of them by law, are void.

ERROR to the Warren circuit. **Debt.** The opinion states the case.

Underwood, for plaintiff.

Mayes, contra.

By Court, OWSLEY, J. Mitchell brought an action against Vance and Covington, upon a bond executed by the two latter, conditioned to save harmless, and indemnify the former against any damage which might accrue to him in consequence of the sale of property, which, as constable, he had taken under an execution which issued in favor of George Clarke against the estate of William McAlester, etc., but the right to which property was claimed by a certain John Maxey.

The defendants filed several pleas, but as the cause went off in the court below upon the demurrers to the first and sixth pleas, we shall barely inquire whether or not, in adjudging those pleas good, the court decided correctly. It is proper, however, to premise that, if the declaration was insufficient, the decision should have been as it was, against the plaintiff, even were the opinion of the court, as to the goodness of the pleas, admitted to be erroneous. The demurrers to the pleas brought the whole of the pleadings before the court, and, in deciding on the demurrers, it of course was incumbent upon the court to decide against the party who had committed the first fault. We have,

therefore, in revising the decisions of the court upon the demurrers, looked into the declaration, and find that it is liable to no substantial objection. It sets out the bond upon which the objection is founded, and contains all necessary averments to show a good cause of action in the plaintiff. We shall, therefore, without further remarks upon the declaration, proceed to examine the goodness of the pleas.

The pleas, though couched in different language, contain substantially the same statements, present the same matter of defense, and may with propriety be considered together. Each plea in substance states that, after the property had been seized by the plaintiff, under the execution which issued against the estate of McAlester in favor of Clarke, it was claimed by a certain John Maxey to belong to him, and that a jury was thereupon impaneled and sworn by the plaintiff to try the right of the property, and that, after hearing the parties, the jury failed and refused to render any verdict; that the plaintiff thereupon refused to make sale of the property, unless the defendant, Vance, would execute bond with surety for his indemnity, and that for the purpose of causing the plaintiff to proceed with the sale of the property, and for no other consideration, the bond was executed, etc.

These facts, if true, and in deciding upon the demurrers, they must be assumed to be so, prove unquestionably that, in refusing to make sale of the property until the bond was executed by the defendants, the plaintiff acted in direct violation of the duties of his office. The jury having failed to render a verdict as to the right of the property, the claimant of the property must necessarily have failed to establish his right; and the act of assembly upon that subject imperatively commands the officer, by whom the property is executed, to sell the property, whenever the claimant fails to establish the property to be his: 2 Dig. 1047.

The bond must, therefore, have been executed for the purpose of inducing the plaintiff to do that which, by the duties of his office, was incumbent on him to do; and as such, we apprehend, is not binding upon the defendants.

Parol promises for such purpose would, in the general, certainly not be binding; and under the act of assembly, which authorizes the consideration of sealed writings to be impeached and gone into, the bond in question can not be sustained, unless a verbal promise of like import would be binding. Whether or not the present bond would have formed an exception to the

rule, which makes void promises to officers, for the purpose of inducing them to perform their duty, if, for selling the property, the plaintiff had been liable to the claimant of the property, is a question not necessary now to be decided, and we shall, therefore, forbear to enter upon its discussion; for the act of assembly not only required the plaintiff, after the claimant failed to establish the property to be his, to make sale thereof, but it moreover explicitly declares that, for selling under such circumstances, the officer shall not be liable to any suit on account of such sale. There is, therefore, nothing in the circumstances of the case which can take the bond out of the general principle which condemns promises of like import. The court was, consequently, correct in adjudging the pleas good.

The judgment must, therefore, be affirmed, with cost.

CROCKETT v. LASHBROOK.

[5 T. B. MONROE, 581.]

ADVERSE POSSESSION—TITLE ACQUIRED BY.—An adverse possession for the period required by law, confers a title on which a party may maintain ejectment.

LANDLORD MAY DEFEND FOR TENANT.—A landlord may always be admitted to defend for his tenant, but he is not allowed to put any thing else in issue, but the title of the land in the tenant's possession; nor can the landlord's title to other lands be determined in such an action.

EJECTMENT—EFFECT OF JUDGMENT IN.—A prior judgment is not conclusive as to the title in a subsequent action of ejectment; nor in an action of trespass brought by a party in possession against a party entering upon the land by virtue of a writ of *habere facias* issued on the judgment; but such a judgment is conclusive in an action for meane profits of the land, and for all purposes necessary to effectuate the judgment.

RESTITUTION—WRITS OF NOT FAVORED.—Motions for writs of restitution are not favored, unless there is no controversy as to the facts; nor will the court, on such a motion, determine doubtful questions as to boundaries, and a decision granting the writ is not conclusive of the rights of the parties.

LIBERUM TENEMENTUM is a sufficient plea in justification, in an action of trespass *quare clausum fregit*.

ERROR to the Mason circuit. **TRESPASS.** The opinion states the case.

Brown, Barry and Depew, for plaintiffs.

Crittenden, contra.

By Court, **MILLS, J.** Andrew Crockett, holding two adjoining grants for land, brought two ejectments for an interference

therewith, held by John Lashbrook under a junior grant. One of these ejectments was served on Lashbrook, who did not reside on the interference, but on adjoining lands within his own grant, and the other on Jonathan Fyffe, who cultivated some cleared land on the interference, and who, shortly after the service of the ejectment, moved over, and from thenceforward resided upon and possessed the whole interference. Lashbrook entered himself defendant in both these ejectments, and in that served on Fyffe by the following order:

“On the motion of John Lashbrook, he is admitted defendant herein, in the stead of Richard Roe, the casual ejector, for the demised premises in the possession of the said Jonathan Fyffe.” And then he entered into the common rule, and agreed to insist upon the title only on the trial.

These two causes were tried at the same time, one next succeeding the other, and that against Lashbrook first. He, on the trial, being at the bar with his counsel, required of the lessor strict proof that he was in actual possession of any part of the interference; and after attempting to prove that he was, by sundry witnesses, the lessor of the plaintiff, suffered a nonsuit.

The next suit, with notice to Fyffe as tenant in possession, was then tried, and a verdict was found generally that the defendant was guilty of the trespass and ejectment in the declaration mentioned, and judgment rendered for the time yet to come in the premises in usual form.

Commissioners were appointed to assess improvements, under the occupying claimant laws, to whom Lashbrook showed the improvements on about seven acres only, alleging that that quantity was all that was possessed by Fyffe at the service of the declaration in ejectment, and, of course, he had only lost that quantity when the whole interference was about sixty acres, the most of which was improved.

When the writ of possession emanated, Lashbrook objected to giving possession of any part except the seven acres; but Dimmit, who acted as the agent for Crockett, the lessor in conducting the ejectments, and who, pending the suit, had procured a conveyance of the land from Crockett, caused the writ of possession to be executed on all the interference, and the possession thereof to be delivered to him; and this has given rise to the two cases now before this court.

Lashbrook brought his action of trespass, *quare clausum fregit*, against Dimmit, for this act, and also instituted against Crockett, in the same court, a motion to set aside the execution of the

writ of possession in part, and for a writ of restitution, to restore to him all that part outside of what he contended Fyffe had in possession at the service of the ejectment. Divers issues were joined in the action of trespass, which will be hereafter noticed, and a trial thereupon had.

By consent of parties, the testimony given before the jury, in the action of trespass against Dimmit, was to be considered as given to the court in the motion for restitution against Crockett; and the court, after hearing this evidence, was to decide thereon, as if given for the purpose of the motion only. The jury found a verdict for the plaintiff in the action of trespass, which verdict the court below refused to set aside, on a motion for a new trial, and rendered judgment thereon for the plaintiff, and also gave judgment against Crockett for a writ of restitution. Exceptions were taken in both cases, whereby the whole evidence and questions of law were spread upon the record. From the judgments on motion Crockett appealed, and Dimmit prosecuted his writ of error in the action of trespass, which are the two cases now before us.

In the action of trespass, Dimmit filed four special pleas in bar, to all of which the plaintiff replied by novel assignment. To each of the replications to the two first pleas, the defendant, claiming the right of a defendant to an original action to plead as many pleas as he pleased, to be restored to him by the new assignment, filed three rejoinders, thus branching these two pleas to terminate in six issues. To all these surrejoinders were filed, and the pleadings continued till the whole six terminated in issues of fact, except one, which was ended in an issue of law by demurrer decided for the plaintiff. Single rejoinders were filed to the replications to the third and fourth pleas, and they terminated in two more issues of fact. We have not thought it necessary, to a full understanding of the questions of law involved, to recite these pleadings *verbatim*, but shall only state so much of their substance as shall be indispensable. Suffice it to say, that the pleadings are generally well drawn, and exhibit more professional skill than is usually found in the country under the loose and careless practice which too much prevails. That branch of issues which terminated in a demurrer must be first noticed, as the decision on the demurrer is attacked by the assignment of errors.

The second plea alleges, in substance, that the close was part of the land contained in the patent of Andrew Crockett, and that the plaintiff became possessed thereof as tenant of

Crockett, and obtained possession under him, and afterward, having obtained a patent in his own name, refused to acknowledge himself the tenant of Crockett, and attorned from him, and claimed the land adversely, and thereupon Crockett brought his ejectment, and served the same with the notice on Jonathan Fyffe, who was at the time, the tenant in possession, and Lashbrook defended for him, and judgment was recovered against him in the usual form, he, said Lashbrook, being found guilty; upon which a writ of possession issued, and he, the defendant, as agent of Crockett, and as a purchaser from him, caused the writ of possession to be executed, and the possession to be delivered to himself, as well he might; and this was the same trespass in the declaration mentioned, and not other or different.

To this plea the plaintiff replied, by setting out the abutments of his close, and excluding the land in the possession of Fyffe, at the service of the declaration in ejectment, averring that it was another and different close from that in Fyffe's possession, and recovered by the ejectment aforesaid, and that this new close, at the date of the service of the ejectment, was in the exclusive possession of him, the plaintiff, as his proper close, and so remained till the commission of the trespass in the declaration mentioned.

To this new assignment the defendant in the third plea rejoined *liberum tenementum* as to the close therein set forth.

The plaintiff then surrejoined more than twenty years' adverse possession in the plaintiff before the commission of the trespass in the declaration mentioned, whereby the defendant's right of entry was tolled.

To this surrejoinder the defendant demurred, and the plaintiff joined in demurrer. The court overruled the demurrer.

It is evident that after the new assignment by the plaintiff, the defendant, in his rejoinder, abandoned the recovery by ejectment of the close so newly set out, and alleged title thereto.

The plaintiff might have traversed this title, and by way of avoidance, have shown that by means of an adverse possession of twenty years this title was destroyed. But he chose to admit the title of the defendant as one existing, and then to show that it was taken away by adverse possession; and although this might amount to the general issue, yet he might specially reply to it. For it is clear that the adverse possession of twenty years destroys the right of entry, and confers a positive title, one on which a party may recover as plaintiff. And as a

party to a plea of title may reply a conveyance, so it is competent for him to show that title has passed from his adversary by the adverse possession. As the defendant, by demurring chose to admit the fact that his title was thus destroyed, it follows that the court below did right in overruling the demurrer.

Another point made on the trial leads us further to examine the issue. The court below decided that the title was not in issue on the pleadings, and so instructed the jury, and rejected the title papers as evidence for that purpose. On looking into all the issues, we find that court was correct, unless it found that the issue joined on the fourth plea involves or questions the title of the parties.

The correctness of this decision is rendered important by an examination of the evidence. The defendant exhibited title; the plaintiff gave evidence conducing to show an adverse possession of twenty years, and the defendant gave evidence conducing to show that when the plaintiff entered, Crockett, the patentee, was in actual possession, and the plaintiff entered as a trespasser, and that to save himself from expulsion, he accommodated the matter with Crockett, the patentee, and agreed with him to hold the land under him contingently; that is, if Crockett recovered an adjoining piece of a neighbor, with whom he was at law, then the plaintiff was to surrender possession to Crockett, but was to keep his possession if Crockett failed against that neighbor, and that Crockett actually succeeded against that neighbor within the twenty years previous to the commission of the supposed trespass. Now, it is evident that the decision of the court excluded from the jury the consideration of the title of Crockett, and the destruction of the effect of twenty years' possession by this supposed arrangement with regard to the possession, and might thus lead them to an erroneous finding.

The fourth plea, and all the subsequent pleadings thereon to the close of the issue, are not free from the charge of duplicity, a charge that is not easily taken advantage of under our code, since the destruction of special demurrers by statute. If, therefore, title is substantially involved, even in a form coupled with other valid matter, it must be regarded.

The fourth plea, in its first part, is a plea of *liberum tenementum* as to the close in the declaration mentioned, and then proceeds, in addition to title, to set out the judgment in ejectment and recovery of the close by Andrew Crockett, and the entry

thereon by virtue of the writ of possession under Crockett, as the same trespass in the declaration mentioned.

To this the plaintiff, in his replication, as to so much of the plea as relies on title, sets out by novel assignment the abuttals of his close, excluding the land in possession of Fyffe, and averring that it was different, and that the plaintiff, at the date of the trespass, had had twenty years' adverse possession thereof, by which the defendant's right of entry was tolled. And as to that part of the plea which alleges the judgment and recovery, and writ of possession thereof, as land in the possession of Fyffe, he again, by novel assignment, sets out the same abuttals of his close, excluding the land in possession of Fyffe, recovered by the ejectment, and averring that it was another close, different from that recovered in the ejectment from Fyffe, and that it was, at the date of the service of the declaration in ejectment, in the possession of the plaintiff himself, and not recovered in the ejectment aforesaid at any time before the commission of the trespass in the declaration mentioned.

To this replication the defendant rejoined that the close newly assigned was his freehold, and that it was also in the possession of Fyffe when the declaration of ejectment was served, and was recovered in the action of ejectment aforesaid.

To this the surrejoinder of the plaintiff is in substance *de injuria sua propria, absque tali causa*, concluding to the country.

We can not view this rejoinder of the defendant to the replication, which newly assigns the close, as doing anything else than alleging title to that close also, and a recovery thereof in the ejectment; and the surrejoinder completely traverses both, and denies that the defendant has title, or that he recovered it in the ejectment of Crockett; and the parties each insist on their title, the defendant by patent, and the plaintiff by twenty years' adverse possession thereto, the defendant that he had regained the possession at law, and the plaintiff denying it. Now, it is clear that the defendant could give in evidence, under this issue, his title, and was bound to do so. The plaintiff could controvert that title by proving twenty years' adverse possession, and the defendant might destroy the effect of that possession by showing that for the whole, or a part, of the twenty years it was held not adversely, but by an arrangement subject to a contingency. If the defendant could establish the recovery of the land, as in the possession of Fyffe, his case was so much clearer; but if in this he failed, and still should prove title, and the plaintiff should fail to show that title barred by adverse posses-

sion, it is still clear that the defendant could, in trespass, justify an entry thereon, even without a judgment and writ of possession. In this instruction and decision the court below, therefore, erred.

The rest of the issues all terminate in the point, whether this land or close, for a trespass on which the plaintiff has brought his action, was in the possession of Fyffe when the declaration in ejectment, and the question of fact is one much disputed in the evidence; but the principal question of law made and decided by the court, and that on which the cause essentially turned, was the following: At and before the date of the service of the declaration, the sixty acres which interfered were nearly all cleared and used as tillable land; but neither Fyffe nor Lashbrook lived upon it, but near to the interference, and outside of it. This land was divided by division fences, for the convenience of cultivation, and it is not disputed by the plaintiff, but that Fyffe occupied or cultivated one of those fields, and that the year following, the declaration in ejectment being served on the thirtieth of December, 1815, Fyffe moved on the interference, and occupied the whole, and cleared some additional land pending the ejectment.

The declaration in ejectment goes for far more land than is sufficient to cover the whole. On the service of the ejectment Lashbrook defended as landlord, without Fyffe. It was contended by the defendant in the court below, and is contended here, that as the verdict and judgment is broad enough when measured by the declaration, to cover the whole interference, it is incompetent for the plaintiff to narrow down that recovery by proving the possession of Fyffe much smaller; and at all events, as the defendant, or Crockett for him, held that of Fyffe in his possession by his tenant, and the residue of the interference in his own possession, that it gave Crockett a right to take possession of the whole according to his title, as well that which was possessed by Fyffe, as that possessed by Lashbrook himself, as that was also in issue. On the contrary, the plaintiff insists that the ejectment only put in issue that part in the possession of Fyffe at the date of service of the ejectment, and that more could not be recovered; that he has a right to prove that possession as small as he can, and as the twenty years' adverse possession, which he attempts to prove, had expired after the service of the ejectment, and before the execution of the writ of possession, it gave him such title to the residue as will enable him to sustain trespass. The court decided in favor of

the plaintiff, and limited the recovery in ejectment as he contended; so that the cause was thus narrowed to the inquiry of fact, whether Fyffe possessed more at the date of service of the ejectment than the seven acres. On this point much contradictory evidence was given, and the jury found for the plaintiff.

In deciding that the lessor of the plaintiff could recover no more than what the tenant, on whom the declaration was served, had in possession at the time, we conceive the court below correct. A little attention to the history of the action of ejectment will prove this.

It was, first, in reality, an action by a lessee against an intruder commenced by writ. It next became a fiction both as to lease and lessee, and was commenced by declaration and notice, and the lessor was the person really interested, and it was thus used for the purpose of trying his title or his right to make a lease. As the lessor could try title, it was but mutual that the tenant should also call to his aid, not only any title which he might have, but also the title of another from whom he derived his possession. And as there might be negligence on the part of the tenant, or collusion between him and the lessee of the plaintiff, especially after fiction, and not reality, was introduced into the action, the tenant's landlord was first permitted by the courts to interpose, and that interposition was afterwards sanctioned and regulated by act of parliament.

But as the landlord, or one under that name, might introduce new titles and defenses which the lessor of the plaintiff did not intend to litigate or disturb, courts were always careful to see that the applicant to be entered as defendant, either with or for the tenant, was really his landlord, or that the tenant derived his possession from him. No other can be admitted. Nor is the landlord, when admitted, allowed to put anything else in issue, but title of the land in the tenant's possession. The meaning and extent of the privilege allowed him is a simple defense for the tenant's possession, and not to bring with him into the cause other controversies about title between him and the lessor of the plaintiff, in which the tenant had no concern. If he could do this, he would or might greatly enlarge and embarrass the controversy, by bringing into it titles which the lessor of the plaintiff never intended to disturb.

Now, as the landlord is bound by the terms on which he gets into the cause to shield the possession or title of the tenant only, it would be preposterous to say that his title to other lands which he could not bring into the cause should be affected

or disturbed by the verdict and judgment. If that be so, then he depends, not on turns of reciprocity, but in great danger of losing his other lands, the titles to which he is bound not to introduce. Hence, we conclude that the possession of the tenant is and must be alone the matter of controversy.

It has been urged that as the verdict and judgment is broad enough in terms to cover this whole territory and more, the defendant therein ought not to be allowed to narrow it by parol proof, and that if he can, the same process of reasoning would warrant his reducing it to nothing. To this we reply that one verdict and judgment in ejectment tried at the time this was is not conclusive in other actions, nor, indeed, in another ejectment for the same lands; and therefore its whole force, or any of its parts, may be controverted.

To the rule that a verdict and judgment in ejectment is not conclusive in another controversy, there are a few exceptions: One is in the action of trespass for the mesne profits; and it may be urged that as the record of recovery in ejectment is conclusive in the action of trespass brought by the lessor of the plaintiff against the tenant or defendant, so it ought to be in an action of trespass, as this is, brought by the defendant in ejectment against the lessor of plaintiff. To which it may be replied that the actions are not alike, or subject to the same rules and doctrines governing each. The action for mesne profits is an equitable action, and partakes of the nature of the fiction existing in the ejectment itself, and may be brought in the name of the fictitious lessee. It is an appendage to the action of ejectment, to enable the lessor of the plaintiff to recover the same damages which was formerly recovered in the action of ejectment; and after the introduction of the fiction, he was allowed to take a verdict of only nominal damages in the ejectment, and then to annex thereto his action for the mesne profits, and recover the whole. Hence, the fiction is extended throughout the latter action, and in order that the fiction may subserve the ends of justice in that action also, the verdict and judgment in ejectment has been held conclusive.

But not so in the action of trespass brought by the present defendant in ejectment. If it is strictly legal, and subject to the ordinary rules which govern other actions of trespass, and the verdict and judgment therein may conclude the rights of the parties in any other controversy.

By an attention to the ancient forms, which are held to be evidence of law, the restriction of the recovery in ejectment to

the premises in possession of the tenant on whom the ejectment was served will be still further illustrated. By the ancient and most correct practice, if the tenant did not defend, and the landlord was permitted to defend alone, the lessor of the plaintiff took judgment by default against the tenant, with a stay of execution until the issue between the plaintiff and the landlord was tried. If the landlord was convicted, no judgment of eviction was rendered against him, except a recovery of costs, and the plaintiff, by order of court, took out his writ of *habere facias possessionem* on the original judgment by default, by which it is evident that nothing but the possession of the tenant, by the terms of the whole proceeding, could be disturbed by the writ of possession. We know that the practice in use among us, which grew out of an erroneous and absurd departure from the ancient mode, is to omit the entry of judgment by default against the tenant, and to proceed to convict the landlord, and render a judgment against him not only for costs, but for the term yet to come and unexpired, and then to take out execution against him, and thereby turn out the tenant. And as held by this court in the case of *Banta etc. v. Clay*, 5 Litt. 129, such writ can, after the defense of the landlord, operate upon the possession of the tenant; so now we conceive it can only operate exclusively on his possession, and not on other possessions of the landlord.

The next point made in the action of trespass arises on the weight of evidence on the motion for a new trial. But as the judgment, as we have already seen, must be reversed on other grounds, we shall waive that subject in the action of trespass, and reserve what we have to say thereon till we inquire into the merits of the motion for a writ of restitution, which now occurs, and in which we act as triers of fact as well as law.

We would remark, before considering the motion for restitution, that we have, and shall throughout both cases consider Dimmit and Crockett as one person, and both of them bound by the proceedings in the whole controversy; for they appear united in the same pursuit so closely, that what is evidence against one, we conceive, was properly admitted as evidence against the other. Motions for writs of restitution, when they depend entirely on facts, in the country, to be proved or disproved by swearing only, have never been favored in this court; and they ought only to be tolerated in cases where there is no controversy about the facts, unless the controversy of facts is

settled by some other legal proceedings and for the best of reasons.

The decision of the court, granting restitution, can not settle the facts, or conclude the rights of the parties. They may again be contested in an action of law; of course, in doubtful cases of fact, it is better to leave the parties to an action at first, than to disturb the attitude in which they stand. Courts generally will, in a summary way, correct an abuse of their process; but when the fact becomes doubtful, whether the process has been abused or rightfully executed, it is better to leave the parties to their remedy by action, especially in a case where none of their rights will be barred by not disturbing the process.

According to these principles, if this case is to be considered on the facts alone, without regard to the verdict which was rendered, we should have no hesitation in saying that the court below ought to have refused its interposition, and to have let alone the execution of the process. On the fact whether Fyffe had the possession of the whole interference when the notice and declaration in ejectment was served upon him, the evidence is somewhat contradictory; but the weight of it is decidedly in favor of Crockett. And although the conflict between the witnesses was such as might induce a court not to interfere after verdict, and grant a new trial, yet, in deciding on it ourselves, we should feel ourselves constrained to decide in favor of Crockett.

The question remains, what influence the verdict in the action of trespass ought to have in settling the disputed facts. It is true the verdict, if it remained, would be conclusive between the parties in another suit; still, we apprehend in this case, the court ought not to have interfered and granted restitution, and that for the following reasons: The jury might have been, and were, probably, misled by the erroneous instruction given them, excluding the title of the defendant below from their consideration, when the issue required it to be submitted; and it can not be doubted that the mere title of the defendant, so far as his right of entry was not tolled by lapse of time, would have shielded him from the action of trespass, even though he had entered without a judgment in ejectment or a writ of possession.

The title of Lashbrook, by possession, was somewhat doubtful to every part, owing to the evidence conducing to prove that his possession was amicable, and consistent with the title of Crockett; but, admitting this point to be in his favor, it is

clear that he failed to prove an adverse possession of twenty years of the whole of the land included in the abuttals set out in his pleadings, and, if he proved it in a small portion only, the verdict might have been found on that alone. The proof is, that Crockett, by his tenants, not only had the first possession of an adjoining tract, which might, according to its intention, extend to both tracts, as he had the elder patent; but he had also an actual possession within the interference when Lashbrook first entered. By this entry, Lashbrook could not have ousted him to the extent of the interference, but only to the extent of his actual close, as held in the case of *Miller v. Humphries*, 2 A. K. Marsh. 446. Still, as he extended his actual close, could he oust the possession of Crockett; and the evidence falls far short of showing that he actually inclosed the whole interference, till within twenty years before the entry of Dimmit under Crockett. The extent, then, of the land to which he ought to be restored, was entirely uncertain, the verdict notwithstanding, and he ought to have been left to try that extent of possession by suit.

Another reason exists for refusing the restitution required, the verdict notwithstanding. As we have said, another ejectment against himself was tried when that against Fyffe was tried, in which he not only denied any possession in himself, when the declaration and notice were served by the plea and demand of his counsel; but he so seriously assured the counsel for Crockett that he had not the possession, that they, believing him, gave up further attempts to prove it, and suffered a nonsuit; and now his success depends on his retracting that denial, and proving it all false, by showing that he himself, and not Fyffe, had possession of most of the interference. These different attitudes in which he has attempted to place himself at different times in this controversy, is not only subject to the charge of immorality, but raises the legal question, how far he is estopped in law, at this time, to prove the contrary to what he at first asserted, for the very purpose of keeping this land from being recovered of him for which he now contends.

The general principle is, that where a party acts with bad faith, in the admissions or declarations which he has made, and has, thereby, induced others to act upon those declarations, and has derived a benefit to himself from it, against his adversary, he shall be bound by it, and shall not, thereafter, in a controversy touching the same matter, prove it untrue. Now, it is evident that Lashbrook did, by these acts and declarations, which he now says were not true, derive to himself the benefit

of getting clear of a recovery of this land against, and to the prejudice of, his adversary. This has occasioned some doubt with the court, whether he ought not to be estopped to disprove the declarations in the action of trespass.

But, upon more mature reflection, we are persuaded it ought not there to conclude him, but can only be given in evidence against him, to bear its ordinary weight; because, by his representations, he got clear of an ejectment only, a recovery in which would not have concluded either his rights or those of his adversary; and as the advantage which he gained, and his adversary lost, was not conclusive, it would be carrying the estoppel too far to silence him in the action of trespass, which may forever conclude the rights of both.

But the verdict and judgment in ejectment, as we have seen, is conclusive to some purposes, and it is particularly so for all the purposes of effectuating the judgment, and this judgment was taken against Fyffe, or rather, Lashbrook for Fyffe, under a conviction induced by Lashbrook that it included the whole interference, and Lashbrook was excused by these acts and declaration. Lashbrook ought not, therefore, for the purpose of defeating the execution of the writ of possession by his motion, to be now permitted to retract and disprove this declaration, whereby he injured his adversary, so soon as he thinks the right of entry is in his favor, by lapse of time. At all events, this is a persuasive circumstance, which ought to induce a court to refuse a summary interposition in his favor, notwithstanding he has a verdict in trespass, but he ought to be left to other remedies to regain the possession which he lost by the writ of possession.

The judgment in trespass, of Lashbrook against Dimmit, must be reversed, with costs, and the verdict be set aside, and the cause remanded for new proceedings to be had, not inconsistent with this opinion.

The judgment in the motion for restitution, in the case of Crockett against Lashbrook, must be reversed, with costs, and the case remanded, with directions to overrule the motion, with costs.

EJECTMENT, judgment in, as evidence of mesne profits: *West v. Hughes*, 2 Am. Dec. 539. The difference between the effect of a judgment in ejectment, under the English practice and such a judgment when rendered under the rules of law and of practice in force in many parts of the United States, is considered in *Freeman on Judgments*, secs. 295-302.

OVERTON v. LACY.

[6 T. B. MONROE, 13.]

PATENT FOR LANDS ISSUED TO TWO PERSONS AS JOINT TENANTS AFTER THE DEATH OF ONE OF THEM, passes the title to the whole estate to the surviving grantee.

TITLE OF ONE OF TWO JOINT TENANTS acquired before the *jus accrescendi* was abolished, is good as against the representatives of the other.

PAROL AGREEMENT BETWEEN JOINT TENANTS TO SEVER JOINT ESTATE, if made before the passage of the statute against frauds and perjuries, will be enforced in a court of equity.

ERROR to the Nelson circuit. The opinion states the case.

Wickliffe and Barry, for the plaintiff.

Crittenden and Hardin, for the defendants.

By Court, OWSLEY, J. On the eleventh of May, 1780, Clough and Waller Overton made an entry for six hundred acres of land, on a treasury warrant, etc., and on the second of September, in the same year, two adjoining surveys of three hundred acres each, were made upon the entry in their joint names. Afterwards, on the first of September, 1782, an inclusive patent for the land contained in both surveys issued from the commonwealth of Virginia to Clough and Waller Overton jointly. A few days however before the date of the patent, Clough Overton was killed by the Indians at the battle of the Blue Licks, having previously, on the sixteenth of July, 1782, made and published his last will in writing.

This will was afterwards duly proved and admitted to record. By his will, Clough Overton devised his interest in the six hundred acres of land aforesaid, to his sisters, Elizabeth, Mary and Sarah Overton, the former of whom afterwards married Batt C. Lacy, and the latter after marrying William C. Lacy, departed this life, leaving an only child, John Overton Lacy. Subsequent to this, but many years ago, Batt C. Lacy, in right of his wife, Elizabeth, and William C. Lacy, as the natural guardian for his son, John Overton Lacy, entered upon one of the surveys which was made under the entry for six hundred acres, claiming the same under the devise of Clough Overton to his sisters, and they have remained in the possession thereof ever since.

Conceiving, however, that under the patent which issued in the name of him and his deceased brother, Clough Overton, jointly, that he was entitled to the whole six hundred acres of land, Waller Overton commenced an ejectment against the

Lacys for the land of which they were possessed, and finally succeeded in recovering judgment.

Batt C. Lacy and his wife, Elizabeth, John Overton Lacy, by William Lacy, his next friend, and Mary Overton, then exhibited their bill in equity, with injunction against Waller Overton. Among other things contained in their bill, they set out an agreement, which they allege to have been made between the testator, Clough Overton and Waller Overton, after the date of the entry, and before it was surveyed, to divide the land between them, each to have three hundred acres by metes and bounds; and they charge that in pursuance to that agreement the two surveys were made, and that the one now in their possession was to belong to Clough Overton, and the other to Waller. They, therefore, contend that although the agreement was never, in the life-time of Clough Overton, entirely fulfilled by the parties extending to each other written transfers for the land to which they were respectively entitled, yet by the agreement each became equitably entitled to a several interest, and they insist that in a court of equity that agreement should be specifically executed, and Waller Overton perpetually enjoined from disturbing their possession, and decreed to surrender to them any title which we may be supposed to have to the survey upon which they reside, etc.

Waller Overton admits the recovery of a judgment in the ejectment by him, insists that the legal title to the whole six hundred acres is in him, and contends that no such agreement was ever made between him and Clough Overton, for a division of the land, as should be specifically decreed by a court of equity, etc.

On hearing, the circuit court made the injunction perpetual against the judgment at law, and decreed Waller Overton to surrender his title to the land in contest to the complainants. To reverse that decree, this writ of error has been prosecuted by Waller Overton.

The position assumed by the plaintiff in error, that by the emanation of the patent, the entire legal right of entry vested in him will not be contested by us. Clough Overton having died before the date of the patent, he, of course, could then take no estate, and though named as one of two joint patentees, the title to the land, nor any part thereof, can not, according to any principle of construction, have passed by the patent from the commonwealth to him. The same objection does not, however, apply to Waller Overton, the other patentee. He was living,

and under no incapacity to take the title at the date of the patent, and must have acquired a title of some sort by the patent which purports to have issued to him and Clough Overton jointly. The only question is as to the description of title that passed to him. The other person named as a joint patentee with him being dead, did he take the entire title in severalty to the whole six hundred acres described in the patent, or did he take a title to but an undivided moiety of the land, and the title to the other still continue in the commonwealth? During the present term, we had occasion to decide upon the effect of a patent which purported to grant lands to two, as tenants in common, one of whom was dead when it issued from the commonwealth, and it was then held that the survivor took title to an undivided moiety only, the title to the other moiety, notwithstanding the grant, continuing to reside in the commonwealth: 5 Mon. 443. That decision we still approve. Tenants in common do not hold a joint title; their titles to land are in their nature several, and are so treated throughout all judicial proceedings. It was, therefore, no doubt correct to decide that a patent which is intended to grant an estate in common to two, does not, on account of one being dead at the time it issues, pass the entire title to the whole of the land to the survivor. A contrary decision would be giving an operation to the grant that never was intended by the grantor, and confer upon the survivor a title to which, by the clear import of the grant, he was not to be invested. But not so as respects patents which purport to grant land to two or more jointly. The title of joint tenants is not like that of tenants in common; it is not several but joint. They hold a unity of title, are said to be seised *per my et per tout*, and as the law stood at the date of the patent in question, upon the death of either tenant, the title would go to the survivor. It is not, therefore, as in the case of tenants in common, necessary to effectuate the intention of the grantor, to limit the operation of a grant to two as joint tenants, one of whom being dead at the date of the grant, to a moiety of the land only. The intention of the grantor and the object of the grant will be better attained by admitting the title of the whole to pass to the living grantee. The title must be so admitted to pass, unless we suppose what is altogether inadmissible, that by the very act of granting a joint title to two, one of whom is dead, a sort of legal severance of the title intended to be granted is produced, and we thereby, instead of making the grantee in being take a title which, as survivor, he

would have held to the whole of the land, if the other grantee had been living at the date of the grant, and afterwards departed this life, we split the title, and make him, contrary to the plain import of the grant, take an estate in a moiety only, and hold the title to that moiety as tenant in common with the commonwealth. We shall, therefore, assume as correct the position contended for by Waller Overton, that the legal title to the whole six hundred acres is in him, and proceed to inquire whether or not the court below was correct in deciding that he should surrender the title to the three hundred acres in contest to the complainants in that court.

If there had been no agreement between Clough and Waller Overton to divide and make partition of the land, we should have no hesitation in saying that Waller Overton ought not to be compelled to surrender the title which he derived by the grant from the commonwealth to any part of the land. Having obtained the title as he did, at a time when the right of survivorship was an incident to estates held in joint tenancy, he must occupy as favorable ground as he would have done had the grant issued in the life-time of both him and Clough Overton, and the title which he now holds had afterwards come to him as the survivor, and although the *jus accrescendi* has never been the favorite of courts of equity, no case is recollected where those courts have assumed the power to dispense with the law, and without any agreement between the joint tenants in their life-time to sever the estate, to compel the survivor to surrender any part of the title to the representatives of the deceased tenant.

But it is in proof in this case that before the death of Clough Overton an agreement was made between him and Waller Overton to divide the six hundred acres between them, and that in pursuance to the agreement so made, two surveys of three hundred acres each, were not only actually executed, but moreover, by mutual consent of the parties, the survey now in contest was assigned to Clough Overton, and the other survey was to belong to Waller Overton. The agreement so made was not, it is true, reduced to writing by the parties, and did not, therefore, in legal strictness, produce a severance of the joint estate; but though by parol, yet as it was entered into before the statute against frauds and perjuries had any operation in the then state of Virginia, the agreement must, we apprehend, in the contemplation of a court of equity have produced a severance,

and no reason is perceived why the agreement should not now be carried into specific execution by the decree of the court.

An agreement of the sort can not be said to be without consideration, and it has been repeatedly decided that parol contracts made before the passage of the act against frauds, etc., may, notwithstanding the after passage of the act, be enforced by the decree of a court of equity.

Understanding the agreement to have thus produced an equitable severance of the interest held by Clough and Waller Overton in the land, the right of the complainants in the court below to the decree which was pronounced by that court in their favor, is plain and obvious. Being entitled in equity to a several interest and estate in the survey in question, it was competent for Clough Overton to devise that interest to others, and the proof in the cause is satisfactory to show that he actually devised the same to two of the complainants and the deceased mother of the other.

The decree must, therefore, be affirmed, with costs.

RICE'S HEIRS v. SPOTSWOOD'S HEIRS.

[6 T. B. MONROE, 40.]

RESCISSORS OF OBLIGEE OF A BOND FOR CONVEYANCE OF LAND who dies before the time fixed in the condition for the conveyance, must be parties to a bill brought for rescission on the ground of fraud on the part of the obligor in misrepresenting boundaries and in selling land to which he had no title; or where a part of the purchase-money remains unpaid.

ERROR to the Union circuit. The opinion states the case.

Talbot, for the plaintiffs.

Haggin and Loughborough, for the defendants.

By Court, OWSELY, J. On the twenty-fifth day of November, 1818, John Rice and Clement Buckman contracted with Philip H. Jones, who was the agent of Alexander Spotswood, for the purchase of two thousand three hundred and sixty-six and two thirds acres of land in the county of Union, at the price of six thousand dollars; one thousand dollars whereof was paid in hand by Rice & Buckman, and for the residue of the price, three notes, payable in one, two and three years thereafter to Spotswood, were executed by them jointly. At the same time, a bond was executed by Jones, as agent for Spotswood, conditioned

to convey the land by deed of general warranty to Rice & Buckman, so soon as the remaining part of the purchase-money should be paid. In December following, Spotswood departed this life, and shortly thereafter Rice also died.

The heirs of Rice & Buckman, afterwards in 1820, filed their bill in equity against the heirs of Spotswood and the agent Jones, and by an amendment to their bill they also made the executors of Spotswood defendants. The object of their bill is to obtain a cancelment of the contract for the purchase of the land, and to be restored the one thousand dollars which was paid by them as part of the purchase-money, on the ground, as they allege in their bill, that false representations as to the boundary of the land were made to them at the time of entering into the contract, by the agent Jones, and that Spotswood was unable to make them a title according to the bond which was given by this agent.

The bill was answered by the heirs of Spotswood and Jones, but the view we have taken of the case renders it unnecessary to take further notice of their answers.

On hearing, the contract was decreed to be canceled, etc., and from that decree the heirs of Spotswood, etc., appealed.

At the threshold we are met with an objection that, unless obviated, renders an examination of the merits of the decree altogether unnecessary. The personal representatives of Rice are not made parties to the suit, and it was objected that without their being either complainants or defendants, it was incorrect for the court below to pronounce a decree upon the merits of the contest. This objection was, in argument, attempted to be gotten over by the counsel of the appellees, and the necessity of making the personal representatives of Rice parties was by them denied. It was contended, that as the death of Rice happened before the title was, by the condition of the bond executed by Jones, to be conveyed, the right of Rice to a conveyance descended upon his heirs, and that neither in a suit to enforce the contract or to set it aside, have the personal representatives of Rice any interest, and should not, therefore, be brought before the court as complainants or defendants. That there are cases in which the action or suit ought to be brought in the names of the heirs, and not the personal representative of the person to whom the bond for a conveyance upon which the action or suit is founded was given, is undoubtedly true; but it is not true, as the argument supposes, that whenever the death of the obligee happens before the time at which, by the

condition of the bond, the conveyance is to be made, the action or suit, whatever may be its object, should be brought in the name of the heirs, without making the personal representatives party.

Though the person to whom the bond is made dies before the time fixed in the condition for the title to be conveyed, there may, nevertheless, at the time of his death be an existing cause of action, in which the personal representatives have a direct interest; and the case made out by the appellees in their bill presents as forcible an illustration of such a cause of action as any other that could be given, were we, amongst the numerous cases that might be mentioned, to attempt to make a selection. The object of the bill, as we have before remarked, is to cancel the contract which was made by Buckman & Rice, in his life-time, with the agent of Spotswood, for the purchase of a tract of land, not, however, on the ground of any failure of Spotswood or his agent to make the conveyance according to the condition of the bond given to Rice & Buckman, but on the ground of fraud in misrepresenting the boundaries of the land sold, and in selling land to which Spotswood never had title. These facts, if they have any existence, must have existed prior to the death of Rice, and if they afford any cause for setting aside the contract, the cause must have existed in the life-time of Rice, so that it would seem that upon the death of Rice any claim which he then had to be restored the money paid by him under the contract passed to his personal representatives, and not to his heirs. But admitting a sufficient cause for canceling the contract to have existed in the life-time of Rice, it was contended in argument that as his heirs would have been entitled to the land after his death if the title had been in Spotswood, and they had insisted upon a conveyance being made to them, that they must also be entitled to whatever is recoverable on a cancelment of the contract. It does not, however, follow that because they would have been entitled to the land, if no fraud had been committed, and the title could have been made by Spotswood, that they must also be entitled to the money paid by Rice for the land, if the contract be canceled on the ground charged in the bill. The right of Rice to be restored the purchase-money which was paid by him is not land, nor does it partake of any of the attributes of land, so as upon his death to have descended upon his heirs as land; but it partakes of the nature of a chattel, and went to the personal representatives of Rice, to whom, at his death, all his chattels passed by operation of law. The personal representa-

tives of Rice must, therefore, have an interest in the money which is claimed by the bill to be restored.

But this is not the only interest which the personal representatives have in the matter in contest. There remains yet unpaid a great proportion of the price agreed to be given for the land, and for which Rice & Buckman executed their joint notes to Spotswood. Upon those notes the personal representatives of Rice are liable to be sued, and of course must have an interest in any suit, the object of which is to obtain a cancelment of them and the contract under which they were executed.

We think, therefore, that the personal representatives of Rice should have been made a party; and as that was not done, the court erred in hearing the cause and pronouncing a decree upon the merits.

The decree must be reversed, with cost; the cause remanded to the court below; and unless in a reasonable time, to be fixed by that court, the appellees, by an amendment to their bill, make the personal representatives of Rice a party, the bill must be dismissed without prejudice to any other suit.

MILLS' HEIRS v. LEE.

[6 T. B. MONROE, 91.]

COMPROMISE OF A DOUBTFUL CLAIM will not be set aside, except for fraudulent misrepresentation or concealment of facts, or for such imposition as amounts to unfair and unconscientious dealing.

CONCEALMENT OF FACTS WHICH A PARTY IS NOT BOUND TO DISCLOSE is not ground for avoiding a compromise; and one party to a controversy concerning land, is not bound to disclose to his adversary defects in his own title.

THE EXISTENCE OF CONFLICTING PATENTS, located on the same land, and held by opposite parties to a compromise, constitutes a good foundation and consideration for such compromise.

THE WORD "WITHDRAWN," found on the margin of a surveyor's entry book, does not prove that the entry was withdrawn.

APPEAL from the Mason circuit. The opinion states the case.

Wickliffe, for the appellants.

Crittenden, for the appellees.

By Court, BIBB, C. J. In 1817, the heirs of Edward Mills exhibited their bill against Lee and Graham, setting forth: That their ancestor was possessed of a tract of land in Mason county, of two thousand acres, granted to him by patent in 1790; that

Arthur Fox's claim of twenty thousand conflicted; that by an agreement between their ancestor and Fox, of 1793, the claim of their ancestor was reduced to — acres; that Henry Lee and Richard Graham asserted claim to this tract, under an entry of twenty thousand acres, in the name of Edward Graham; showed their ancestor the entry, a decree for the title against the heirs of Edward Graham, a patent for the same to the heirs of Richard Graham, deceased, under whom they alleged they derived title, when in fact and in truth, "the warrants on which said entry was made were withdrawn and assigned to other persons, in whose names they had been entered elsewhere, and no legal survey had ever been made on said land, a certain John Waller having made the survey and returned the plat and certificate thereof, on the — day of —, in the year —, pretending to act as deputy for Thomas Marshall, surveyor of Fayette county, who had been then dead a number of years; on which pretended and illegal survey and return, a patent had been illegally and fraudulently procured, younger in date than that under which your complainants' ancestor held title; that said defendants, well knowing the premises, fraudulently concealed the same from the ancestor, and represented their claim to be a good and valid claim, and the survey thereon, and the registry of the plat and certificate and emanation of the grant to have been strictly legal; and said Edward Mills, well knowing at the time that the entry under which he held was invalid, and believing and confiding in the representations of the defendants, that their claim was superior, he conveyed them his land on the first day of May, 1810, for no other or further consideration than a payment for the lasting and valuable improvements made thereon; that their ancestor, in his life-time, discovered the fraud and applied to them to rescind the contract, which they refused, but made him the proposals signed by the defendants and marked A, which shows that nothing was paid their ancestor for the land, and the value of improvements alone was taken into consideration."

This paper A is in form of an agreement drawn and signed by the defendants, but never signed by the ancestor, or any one on his behalf, proposing that the compromise between Mills and Fox, and between Mills and Graham and Lee, shall be submitted to men learned in the law, to be chosen by the parties to say, whether under all the circumstances relative to both compromises, said Lee, acting on behalf of Fox's heirs and Graham, ought to give up Fox's bond to Mills, which Mills had surren-

dered under the second compromise between Mills and Lee and Graham; if so, then that Mills shall receive one dollar per acre for all the land held by Mills under said agreement, except fifty acres sold by Mills to Jones; twenty acres sold by him to Gates; and sixty acres sold by him to McMichael; provided, however, that if Lee's and Graham's claim is established, the whole of this agreement to be void; this proposition submitted by Lee and Graham, and signed by them, with a view that Mills should sign it, bears date in September, 1810.

The prayer of the bill is to rescind the agreement between Mills, Lee and Graham, and have the land reconveyed to the heirs of Mills.

The answers set forth, that the compromise complained of, was of a suit then actually brought and pending between Lee and Graham as complainants, under the entry of Edward Graham, for twenty thousand upon a survey executed by John Waller, in 1784, for fourteen thousand three hundred and fifty acres, part of the entry of twenty thousand acres, and patent thereon; that Waller was, when he executed the survey, a lawful authorized deputy of Thomas Marshall, then surveyor of Fayette, the land then lying in Fayette; that the survey was recorded in Fayette by the successor of Thomas Marshall, and the patent obtained thereon by the trustees of Richard Graham, deceased, in virtue of a decree in chancery, all of which they believe to have been fairly and legally done.

They set forth the agreement of 1809, between Mills and the defendants in this suit, and exhibit the agreement, and the deed afterwards made to them by Mills, in pursuance of that agreement, dated in 1810, by which it appears, that the compromise was of a suit then pending on the adversary conflicting claims; it recites that Mills, "after a full investigation of the aforesaid claims, being of opinion that the said Edward Mills's claim can not be sustained against the said Lee and Graham," agrees to convey by quitclaim to Lee and Graham, the aforesaid survey of two thousand acres; Lee and Graham to pay Mills for all improvements, by himself or those claiming under him, agreeable to the occupying claimant law; Mills to retain seventy-five acres sold to Smally and Gates, sixty acres sold to the widow McMichael, at valuation, to be deducted out of the valuation of improvements.

In May, 1810, Mills conveyed to Lee and Graham the tract of two thousand acres, by a quitclaim deed, with a special provision that if the land should be taken by any other claim,

Lee and Graham shall bear the loss, without any compensation therefor from Mills. They admit that there was a marginal note to the entry in the surveyor's office, signifying "withdrawn," but that, upon search, no entry withdrawing it can be found; and assert that Mills was apprised of that. They deny that the warrants upon which Graham's entry was founded, were properly or legally withdrawn from the office.

They say there were these considerations to the agreement of compromise: The dismissal of the suit then pending, which has been accordingly done at their costs; the paying for improvements, which has been done, and the relinquishment of their claim to the persons holding under Mills, named in the agreement, which has also been done.

They deny all the fraud wherewith they are charged, and insist that the terms in paper A, exhibited by complainant, but rejected by him, were offered on their part, not on an application by Mills to rescind the compromise, but on an application by him to them to pay one dollar per acre for his claim, which he said he had been offered by another, and deny that Mills ever desired or offered to rescind, but wanted a dollar per acre, which had been offered by another after the compromise; they rely also on the length of time which has elapsed.

The bill was dismissed by the circuit court on hearing, and Mills' heirs appealed.

The bill, answers, exhibits, facts agreed, and facts proved, present the case thus: The compromise complained of was of a controversy upon conflicting patents, issued from the land-office, and of a controversy then in litigation in a suit in equity, pending between the parties to the compromise.

The bill alleges, as the foundation for impeaching the compromise, that the warrants upon which Edward Graham's entry of twenty thousand was made, had been withdrawn and appropriated elsewhere by the assignees of those warrants; 2. The illegality of the record of the survey by the surveyor of Fayette, which survey had been executed by Waller, pretending to act as deputy of Thomas Marshall, who was dead long before the certificate of survey was returned to the office of Fayette; 3. The illegality of the patent founded on such a survey; 4. The knowledge of the facts on the part of the defendants, Lee and Graham, and the concealment of those facts from the ancestor of the complainants; 5. That the defendants, Lee and Graham, represented their claim to be good and valid.

The bill as drawn, is skillfully worded, so as to involve the

defendants in a knowledge and concealment of the facts charged, and the inferences of law drawn in the bill from those facts. As to inferences of law thus charged, it is sufficient to say that they are denied by the answer; and the defendants aver that they were advised by counsel learned in the law, that their claim was good and valid. In this place it is needless to inquire as to the effect of such a charge, of legal inference from facts; they belong to the court, and will be noticed more properly in an after part of the subject. As to facts, therefore, upon which the legal inferences depend, and as charged in the bill, they are to be considered under two aspects: First, as they existed at the compromise; secondly, as to the knowledge and concealment of those facts by the defendants, from Mills, the ancestor.

As to the warrants, the complainants produce copies of six of the warrants for two thousand acres each, part of those upon which Edward Graham's entry was made, with copies of assignments with Graham's name, in April, 1785, and a survey, on those warrants and another, for twenty-six thousand five hundred, for Wilkinson and others, assignees of those six warrants, executed on the tenth of June, 1785, by S. Morgan, deputy for Thomas Marshall, surveyor of Fayette.

The survey of Edward Graham, for fourteen thousand five hundred, part of the entry of twenty thousand, was executed on the thirtieth of September, 1784, by Waller, who then was a lawful deputy of Thomas Marshall, surveyor of Fayette county, in which the land then lay; this survey was returned to Fayette office in 1803, 1804, or 1805, and received and recorded by Richard Higgins, then the surveyor; Waller not being a deputy of Higgins, and the land not then being within the curtailed limits of Fayette.

There is no withdrawal of Graham's warrant on the entry books of the surveyor, the marginal word "withdrawn," being all that is found.

There is no evidence that Lee or Graham were informed of the assignments, or pretended assignments, of the six warrants, part of the twenty thousand acres of Edward Graham, at the time of the compromise; nor any evidence of any representations by Lee or Graham to Mills to induce him to compromise, nor of any assertion of the validity of their claim, other than the allegation thereof by their bill in equity then pending against Mills; so far from it, Mills was induced to the compromise by calculations and representations made by his son, one of the present complainants, that the value of the improvements pro-

posed to be pail, would buy land elsewhere, on which they could live comfortably, and if they defended the suit pending, and were unsuccessful in that defense, the costs would eat out his substance and ruin him, and brought to his view the consequences of a former unsuccessful law suit.

The complainants, however, did know of the return of the survey to the office of Fayette, after the death or resignation of Thomas Marshall, and of the consequent progress in obtaining their patent; and there is no proof that these facts were disclosed to Mills.

That the entry of Graham (if not rendered null or vacated by the withdrawal of the warrants, or by the return of the survey to Fayette, after Higgins was surveyor, and Marshall out of office) was not valid, special and precise, that this entry would not have otherwise been the superior claim to that of Mills, is not alleged. The destruction of the entry, survey, and patent, under which Lee and Graham held and founded the suit then pending, by reason of the assignment of the warrants; the manner of returning the survey and obtaining the patent after such assignments and upon such process in the surveyor's and register's offices are relied on as vacating the entry of Edward Graham, and the patent of the then complainants, Lee and Graham, provided Mills had then known of those defenses; and the grievance complained of is, that the then complainants, now defendants, Lee and Graham, did not disclose those facts before they made the compromise.

To maintain the bill by Mills's heirs, they propose now for adjudication, that the facts set forth in their bill about the assignment of the warrants, and the process of obtaining the patent upon Graham's entry, of which they knew not then, would have been sufficient, if disclosed to them by Lee and Mills, to have enabled the ancestor, Mills, to defend and defeat the bill then pending; and, secondly, that Lee and Graham were bound to disclose these facts if they knew them.

Lee and Graham had an entry, survey and patent conflicting with the patent of Mills; they had asserted their claim in a court of justice; their patent was obtained according to the forms of law, and the entry is admitted to be special and precise, and the claim was apparently valid. Mills, the ancestor, had also a patent, derived according to the forms of law; but as the compromise admits, not to be maintained as the superior claim, but by showing something in destruction of the claim of Lee and Graham.

Mills's claim had no positive merit; its force consisted in the date of the grant; the defense of Mills in the bill then pending, consisted in his ability to show something to destroy the claim of the complainants, for Graham's entry was valid. The heirs say, their ancestor, of himself, knew not of the defenses now set up, and compromised because Lee and Graham did not disclose these weaknesses and imperfections in their own claim.

Whether the facts relied upon in this bill, would have been sufficient to defeat the bill pending at the time of the compromise, is a question which this court need not go into. The comparative merits and demerits of the two conflicting claims which were compromised, will not now be tried. The claims conflicted; they were sued out from the land-office according to the forms of law; they were conflicting patents, actually located on the same land. This was enough to lay a good and equitable consideration and foundation for the compromise. If neither party superinduced the compromise by fraud or imposition, neither party can attack the compromise by showing his claim was the superior in law or in equity.

In *Conn v. Conn*, 1 P. Wms. 726, it was decided by Lord Macclesfield, "that where two parties are contending, and one releases his pretensions to the other, there can be no color to set this release aside, because the man that made it had the right; for by the same reason there can be no such thing as compromising a suit nor room for any accommodation; every release supposes the party making it to have the right; but this can be no reason for its being set aside, for then every release might be avoided."

If the party releasing was ignorant of his own right, or if his right is concealed from him by the person to whom the release is made, there will be good reasons for the setting aside the release.

In *Stapleton v. Stapleton*, 1 Atk. 10, it was decided by Lord Hardwicke, "that an agreement entered into upon a supposition of a right or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must always be on the one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation of an agreement."

In *Pullen v. Ready*, 2 Atk. 592, the case of *Conn v. Conn*, was again approved, and also in this court, in *Taylor v. Patrick*,

1 Bibb, 171; *Fisher v. May's heirs*, 2 Id. 449; and in *McIntire v. Johnson*, 4 Id. 49.

The compromise of a doubtful claim can not be set aside, but for fraudulent misrepresentations of facts, or fraudulent concealment of facts, or such imposition otherwise as amounts to unconscientious and unfair dealing.

We say fraudulent concealment of facts, because a concealment of that which the party was not bound to disclose, would not be ground for avoiding a compromise. Suppose Lee and Graham had known that these warrants had been assigned away after the survey of 1784 had been executed, and that other lands had been surveyed in 1785, and believed, as they state, that those assignments had been illegally and surreptitiously made, were they bound as suitors in court, upon a treaty of compromise, to have disclosed the facts to their adversary, to strengthen his defense in case no compromise was effected. To say that they were, would be to lay down a rule too refined for the common sense and understandings of upright men. It would, in effect, prescribe to those in a treaty for a compromise of doubtful conflicting claims, the duty to disclose the weaknesses, doubts and difficulties of their respective claims and discourage all compromises.

Cicero, in his book *De Officiis*, gives his opinion that a corn merchant arriving at Rhodes at a time of great scarcity, knowing that a large supply is on the way, ought to disclose the fact to the islanders, so important to them to know, and that he ought not, by concealment, get a much higher price for his own cargo; and he argues well as a moralist in favor of that opinion. But what merchant ever acted upon that pure system of ethics? Could a court of equity set aside his sale, for want of such a disclosure? However devoutly it is to be wished that mankind could be brought in their contracts to observe such a refined system of morality, yet if courts of equity were to act upon it (as Judge Pendleton said in *Jolliffe v. Hite*), it would, in the present state of society, produce more evil than good.

Courts of equity will hold the one party or the other responsible for the truth of the representations made in their communications relative to a contract, and if the fact be unfairly or untruly represented, whether innocently or designedly, the party to whom the representation is made shall not be injured by it. So, also, it holds a party contracting, to abstain from fraud or deceit by concealment of facts which, in fair dealing, the one

party has a right to expect to be disclosed, and which the other party is bound to disclose. It may be difficult at all times to discern the true line between that which a party may lawfully forbear to disclose, and that which he can not withhold without incurring the guilt of fraud or deceit. The circumstances not disclosed must always be compared with the object and end in view by the contracting parties. In the present case the end and aim of the parties in contracting and compromising an existing suit was to avoid the hazard and expense of litigation. No reasonable man ought to expect in such communication that the one party or the other is bound to mutual disclosure of the means of attack and defense in case the compromise does not succeed. Such a rule would forbid all attempts at compromise.

In the present controversy, the entry, the survey, the grant, and the confiction of that grant with Mills' grant, all existed. The entry had not been withdrawn, the warrants for part only of Graham's entry, twelve thousand out of twenty thousand, had been assigned after the survey of 1784 was executed; these assignments were not made by Lee or Graham; but as they allege illegally, and without authority; were they bound if they knew of those assignments done by others, to have disclosed them in a treaty having in view the compromise of the pending litigation? Although such a disclosure might have had some bearing in the treaty, by enhancing or diminishing the demands of the one party or the other, as to the terms of compromise, yet the authority and legality, and consequence of the fact of the assignment of the warrants so made, was itself a matter to be controverted. The assignments of the warrants subsequent to the entry and survey of Graham may be likened to the supply of corn on the way to Rhodes, in the case before stated from Tully. A court of equity could not interfere to abrogate the contract made for the corn, because the failure to communicate the supply which was on the way, was an extraneous circumstance, which the seller was not bound to disclose, howsoever it might have influenced the purchaser if known. So the facts in the bill compared with the subject of the treaty and contract were matters extraneous. They moreover were not resting solely in the knowledge of Lee and Graham, but accessible to Mills upon inspection of the records, and inquiry of the surveyor; they were matters which the defendants were not bound to disclose in a treaty and communication on the subject of compromise of the litigation. Was Mills bound to have disclosed facts behind his patent, survey, and entry, or

other defect in his claim, which would have rendered it worthless, and not entitled him even to the benefit of claiming compensation for his improvements. Courts of equity do not discountenance compromises of doubtful claims, much less of suits actually instituted for litigating such claims. The rule contended for by the complainants would tend to defeat and discourage all compromises.

Without doubt it may be affirmed, that the actual interference which existed between the entry, survey and patent of Lee and Graham, with the patent of Mills, was such an existing claim, such a doubtful right, as to be a substratum and good consideration for the compromise, without intending to intimate any opinion as to the effect and legal consequences of the facts charged in the bill to invalidate the entry, survey and patent under which Lee and Graham claim, provided they had been insisted on by way of defense to the bill in equity, which was compromised. We think they furnish no ground for impeaching the compromise. It was free from fraud or imposition, and Mills having put himself on the safe side of the hedge by the compromise, and actually received the consideration, his heirs now come into court, wishing to try whether the claim of Lee and Graham was invalid, and obtain all the benefits of litigating that question, without danger of loss. If the facts amount to a destruction of Lee and Graham's claim, then the heirs would have the land, and set aside the compromise; if not, they will yet hold the money received for the improvements, and the title of Lee and Graham to the two tracts which they sold out of their claim.

“The solemn agreement, release and conveyances made by the parties in the spirit of compromise, are not slightly to be blown off and set aside.”

Decree affirmed, with costs.

In *Fisher v. May*, 5 Am. Dec. 626, it was held that the compromise of doubtful claims is a good consideration for a contract, and the court will not investigate the relative merits of the two claims, with a view to set aside the compromise.

WEBBER v. COX.

[6 T. B. MONROE, 110.]

OMISSION OF SHERIFF TO COMPLY WITH DIRECTIONS OF THE LAW, with respect to notice of time and place of sale, does not vitiate a sale made to an innocent purchaser; but fraud on the part of the officer, with knowledge on the part of the purchaser, will render the sale void.

EJECTMENT. Appeal from the Breckenridge circuit. The opinion states the case.

Hardin, for appellants.

By Court, Owsley, J. This is an appeal from a judgment rendered against Webber and Stith, on the trial of an ejectment brought by them, to recover the possession of land in the county of Breckenridge.

The title under which they claim the land, was, on the trial in the circuit court, attempted to be derived through a sale made of the land by the sheriff of Breckenridge county, in virtue of an execution to him directed, and a deed of conveyance made for the land by the sheriff to Webber and Stith, who were the purchasers at the sale; but it was made to appear to the court, that two courts had been holden for the county of Breckenridge, between the time the execution came to the hands of the sheriff, and the day on which the land was sold, and that there were more than twenty days between the time of holding the first court and the sale, and less than ten days between the sale and the time of holding the other court, so that it was evident that in making sale of the land, the sheriff could not have complied with the requisitions of law in advertising the time and place of sale on some court day, not more than twenty, nor less than ten days from the day of sale. The circuit court, being of opinion that this default of the sheriff, in not advertising the sale according to law, vitiated the sale, instructed the jury that the purchasers, Webber and Stith, through the sale and deed of conveyance made to them by the sheriff, derived no title to the land, and the only question presented for the revision and decision of this court involves the correctness of that instruction.

The instruction of the court does not accord with our understanding of the correct doctrine of the law. It no doubt forms part of the official duty of sheriffs to give due and legal notice of the time fixed for making sale of lands, or other property taken in execution by them, and for any injury which may be sustained by others by their failure to do so, the law must be understood to afford redress to the party aggrieved. But it does not thence follow that the purchaser at such a sale by the sheriff, does not take a good title to the property sold. To the contrary, the provisions of the act of the legislature, with respect to the notice of the time and place of sale, have been decided to be directory to the officer having the execution, and

that the departure from the directions of the law in that respect by the officer, does not *per se* vitiate the sale. It would, indeed, in most cases, be out of the power of all those who might be disposed to buy at such sale, to ascertain and know whether or not the officer by whom the property is exposed to sale, has in every respect complied with the directions of the law, and if every failure on his part to do so, was allowed to affect the sale, but few would risk to become purchasers at such sales, and the interest of both creditor and debtor would be greatly prejudiced. Hence, the propriety of not making the purchaser look to a correct fulfillment of the duties prescribed by law to the officer, in making sale of property taken under execution, and if any injury be sustained by the officer's neglect to fulfill the directions of his duty, to leave the party sustaining the injury to his redress against him. We would not, however, be understood as deciding that in no possible case of such a sale, can the property be reached in the hands of the purchaser.

The officer may be guilty of such a palpable violation of duty in departing from the directions of the law, as to convict him of gross fraud in making the sale, and it is not intended to say that the land sold might not, in such a case, be reached in the hands of the purchaser with knowledge of the fraud. But it is the fraud of the officer and purchaser that in such a case vitiates the sale, and the omissions of duty on the part of the officer, and knowledge thereof by the purchaser are adverted to for the purpose of establishing the fraud. The failure to advertise in strict conformity to the directions of the law, is not *per se* fraudulent. There may be departures from the strict line of official duty, by the officer, without a corrupt or fraudulent intent, and with a knowledge of such failure of duty on the part of the officer, the land may be purchased without turpitude of motive in the purchaser. In contests for the land purchased, therefore, the question must always be not barely whether there was a failure in the officer to fulfill punctiliously the directions of the law, in advertising and making the sale, but whether, in doing so, fraud was intended by the officer and purchaser. If, then, it be on the score of fraud only, that the right of the purchaser can be affected, it follows that in this case the instructions of the court below can not be correct. For the instructions were not hypothecated upon the idea that any fraud had been committed in the sale of the land which was purchased by Webber and Stith, or if such an idea was entertained, the record furnishes

no sufficient evidence to prove the fraud. It is apparent, from the evidence, that the sheriff must, if he advertised the time of sale at all, have either not advertised at a court day, or if he did, he must have given more than twenty or less than ten days notice of the time of sale, and in either case the directions of the law were not fulfilled. But all this may be true, and yet the sheriff and purchaser may both have had no corrupt motive, and we do not feel ourselves at liberty, from these facts, to presume that either of them intended a fraud upon the debtor, against whom the execution issued, or any other.

Hence, we think that the court should not have given the instructions to the jury.

The judgment must be reversed with cost, the cause remanded to the court below, and further proceedings there had, not inconsistent with this opinion.

It was decided in *Kean v. Newell*, 14 Am. Dec. 321, that even fraud in a sheriff's sale does not prejudice an innocent purchaser; and in *Cox v. Nelson*, 15 Id. 89, that purchasers at execution sales are not bound by the irregular acts of the officer in which they do not participate. To the same effect: *Hamilton v. Shrewsbury*, Id. 779.

ALLEN v. YOUNG.

[6 T. B. MONROE, 136.]

A VERDICT BASED EXCLUSIVELY UPON THE TESTIMONY of an infamous witness should be set aside.

CREDIT OF A WITNESS MUST BE IMPEACHED OR SUSTAINED by evidence of his general character, and not of his conduct in particular cases.

TROVER. Appeal from the Montgomery circuit. The opinion states the case.

Triplett, for the appellant.

Crittenden, for the appellee.

By Court, BIBB, C. J. The verdict, as rendered in this case, can not be approved, unless credence be given to the evidence of William Caldwell. His testimony is of a confession by Allen to him that the negro (alleged to have been converted to the use of the defendant, Allen), was sent off by one Woods to Texas, from the county of Montgomery. The species of confession deposed to by Caldwell is in itself the weakest and most unsatisfactory of all testimony deemed competent in law on account of the facility with which it may be fabricated, and the

difficulty of disproving it, if false, by direct negative proof: *Snelling v. Utterback*, 1 Bibb, 611 [4 Am. Dec. 661]; *Morris v. Morris*, 2 Id. 311.

But the confession of Allen is deposed to by William Caldwell, who, by his own account, was at the time engaged in counterfeiting and fabricating a letter, as if from a man in Alabama, to Young, who, by the deposition of himself, had escaped from jail, under a prosecution for passing counterfeit money, and was then under the impending prosecution; who, by his own confession, and by general reputation, was associated with a band of counterfeiters, and by the testimony of respectable witnesses, is of infamous character. It is due to the pure administration of justice, to example and effect in society, that a verdict based exclusively upon the testimony of confession, sworn to by such an infamous witness, should not stand. It would be vain to attack the credibility of a witness if evidence of such depravity and infamy is to be of no avail with the court. The juries will do their duty and exercise their powers; the court must do theirs in supervising the verdict of juries.

In the progress of the trial, objections were made to the admissibility of evidence, and overruled. The bill of exceptions is awkwardly worded; but by comparing it with the evidence detailed, and permitted to go to the jury, the objection made and the opinion of the court thereupon is explained. Evidence was permitted to be introduced by the plaintiff to induce credence to be given to Caldwell, his own witness; that whilst Caldwell was in Mount Sterling, he had "acted with punctuality;" that in breaking up the counterfeiters with whom he was associated, he had "acted with truth, and so as to justify confidence;" that by letters from Tennessee it was stated "that, in the matter of breaking up the gang of counterfeiters Caldwell might be depended on, and he had seen nothing in Caldwell to give him, the witness, an opinion different from the recommendation."

This species of evidence of punctuality and fidelity in a particular transaction was not admissible on the part of the plaintiff to support the credit of his witness; for if such evidence was proper for the plaintiff, by the same rule it would be permissible for the defendant to go into evidence of want of fidelity and truth in other particular transactions from which the witnesses to such particulars had, from their own knowledge, drawn conclusions that Caldwell was unworthy of credit. This

is not the kind of evidence by which the credit of a witness is to be impeached or sustained; his general character, but not his conduct in particular cases, must be the subject of inquiry. Mr. Stockton's own particular confidence from his own knowledge of the conduct of Caldwell in the matter of breaking up the counterfeiters was improperly permitted to go to the jury.

It seems to this court that the circuit court erred in permitting the evidence to go to the jury, which was objected to, as stated in the bill of exceptions, and also in refusing a new trial.

Therefore, it is considered by the court that the judgment be reversed, the verdict be set aside, and that the cause be remanded for a *venire facias de novo*.

Appellant to recover his costs.

HOW WITNESS MAY BE IMPEACHED.—See *Blue v. Kibby*, 15 Am. Dec. 95, and note, 96.

TAYLOR v. BRADSHAW.

[6 T. B. MONROE, 145.]

EQUITY WILL NOT RELIEVE AGAINST A JUDGMENT AT LAW upon the ground of the discovery of new evidence after the trial, where the party did not use due diligence in procuring the evidence, which was within his reach before the trial.

A PARTY TO A SUIT IS NOT BOUND TO DISCLOSE TO HIS ADVERSARY facts which tend to defeat or weaken his own right of recovery; and he commits no fraud by remaining silent.

WHERE A DEMURDER IS INTERPOSED the bill is to be taken as true.

APPEAL from the Greenup circuit. The opinion states the case.

Tripllett, for the plaintiff.

Mayes, for the defendant.

By Court, Owsley, J. The present appellants brought an action of ejectment against the appellee, and finally succeeded in recovering a judgment for lands of which he was possessed. The appellee, claiming to be paid for the improvements made by him on the land, applied to the court and obtained an order appointing commissioners to value the improvements under the act of 1812 concerning occupying claimants.

This order was made without opposition on the part of the appellants, but before the commissioners acted upon the subject an order was made reserving to the appellants the privilege

of contesting the right of the appellee to pay for his improvements on the coming in of the commissioners' report, and after the report was made to court the appellants appeared by their counsel and urged their objections to the claim of the appellee for improvements.

Their objections were, however, overruled, and judgment entered in favor of the appellee, according to the report of the commissioners. Some time thereafter the appellants filed their bill in equity with injunction, to be relieved against the judgment which was rendered on the commissioners' report. The bill was demurred to by the appellee, and the demurrer sustained. From the decision on that demurrer this appeal was prayed, and the only question now to be considered involves the correctness of that decision.

As the cause was decided upon demurrer, it is proper that we should, in revising the decision of the circuit court, assume as true all the allegations of the bill, and inquire whether or not, as such, any sufficient cause is shown for the interposition of a court of equity.

The grounds for relief, as contained in the bill are two-fold:

1. The discovery by the appellants, since the judgment, of evidence going to show that when the appellee seated and improved the land, he had no title, either legal or equitable, to entitle him to pay for his improvements, under the act concerning occupants.

2. That the discovered evidence was known to the appellee at the time of his obtaining the order appointing the commissioners, and by him fraudulently concealed from the appellants until after the adjournment of the court at which the judgment was rendered upon the commissioners' report.

Before Bradshaw settled upon the land, he had obtained from William Meek an assignment of a bond which had been previously given to him for a title by James Wynn, in whose name a survey, including Bradshaw's settlement was made, in 1795, for twenty-four thousand three hundred and twenty-four acres, under an entry dated in 1783; and for the purpose of bringing his case within the provisions of the occupying claimant law, and to show his right to compensation for the improvements made by him on the land, Bradshaw produced in the court before whom the report of the commissioners was pending, the bond given by Wynn to Meek, dated November, 1803, the assignment thereof to him by Meek, dated January, 1804, and a certified copy from the register's office of the sur-

vey, which was made the seventeenth day of December, 1795, in the name of Wynn, for the twenty-four thousand three hundred and twenty-four acres of land, together with the following indorsement on the back of the copy of survey, to wit: "William Johnson, assignee of J. Wynn, twenty-four thousand three hundred and twenty-four acres." Upon this evidence, Bradshaw was adjudged to be entitled to the benefits of the occupying claimant law, and judgment entered in his favor, upon the report of the commissioners.

The evidence which is alleged by the appellants to have been since discovered by them, and which they contend goes to show that, at the time of his settling upon and improving the land, Bradshaw had no title, either legal or equitable, deducible of record, consists of an assignment by Wynn to William Johnson of the plat and certificate of the twenty-four thousand three hundred and twenty-four acres of land, survey of Wynn, dated before the bond of Wynn to Meek, and that the patent which also issued from the commonwealth to William Johnson, as assignee of J. Wynn, before the date of Wynn's bond to Meek for the same twenty-four thousand three hundred and twenty-four acres that was surveyed for Wynn.

The evidence which is thus alleged by the appellants, to have been discovered by them since the decision of the court upon the report of the commissioners, would doubtless have had an important bearing upon the opinion of the court, if it had been produced on the hearing of the objections which were taken to the right of Bradshaw to be paid for his improvements under the occupying claimant law, when the commissioners' report was under consideration. But admitting the materiality of the discovered evidence, and conceding that if it had been before the court on the hearing of the objections to the report of the commissioners, the decision should have been in favor of the appellants, and not, as it was, against them; still it will be found that the appellants have not made out such a case as will authorize a court of equity to lend its aid, and relieve them against the judgment, upon the ground of discovered evidence. For the assignment of the plat and certificate of survey, by Wynn to Johnson, and the patent to Johnson, both of which are alleged to have been discovered, were of record in the office of the register, to which all may have access, and if not known to the appellants before the copy of the survey was produced by Bradshaw to the court, they must, upon reading the indorsement upon that copy, have perceived that in all probability such

an assignment and patent did exist, and as vigilant suitors should have employed the appropriate means by searching the office of the register to find them, before the case was decided by the court. Having, however, failed to do so, the appellants, under their alleged discovery, do not present themselves before the court free from fault, and it is an established rule with courts of equity, never to relieve a party against the effect of his own laches in a matter exclusively cognizable in the court by which it has been determined.

With respect to the second ground relied on for relief, there is still less pretense for the interposition of a court of equity. Though Bradshaw is charged in the bill with having committed fraud in concealing from the appellants the facts of the assignment of the survey by Wynn, and the emanation of the patent thereafter to his assignee, Johnson, there is nothing in the facts alleged, which, according to any fair inference, can be construed into such a fraud as will warrant the interference of the court. We have seen that by the indorsement which was upon the copy of the survey that was produced to the court by Bradshaw, the appellants might reasonably have inferred that the plat and certificate of survey had not only been assigned, but that a patent had also issued for the land contained in the survey to Johnson; and after having furnished evidence of that sort, it would be going further than we have any recollection of any court ever having gone, and further than any court ought to go to fix upon Bradshaw the commission of fraud, merely because he did not disclose to his adversary all the circumstances within his knowledge that might tend to weaken his claim or defeat his recovery.

Fraud may, no doubt, be, and frequently is, committed by the suppression of truth, as well as by the suggestion of falsehood, and it is equally competent for the court to relieve against the fraud whether it be perpetrated in the one way or the other. By suppressing the truth the deception may often be as base and the injury to others as great as by the suggestion of falsehood. But the failure to disclose to others whatever is known to us can not, with any propriety, be at all times a suppression of the truth.

From those who have reason to expect information from us the truth should not be withheld, but such as look not to us for information and expect no disclosure from us, have no cause to complain of our silence, and to reproach us for not speaking, with having suppressed the truth.

By the act of Bradshaw's asserting claim for improvements, the appellants were admonished not to expect from him a disclosure of any which would prove that he was not entitled to the benefits of the occupying claimant law, and it would be preposterous to suppose that they were deluded and deceived by any failure of his, in not disclosing to them the evidence which might defeat his claim.

Neither on the ground of discovered evidence nor that of the alleged fraud can it, therefore, be competent for a court of equity to grant relief against the judgment rendered on the commissioners' report, and the court below was consequently correct in decreeing a dismissal of the appellant's bill.

The decree is, therefore, affirmed, with costs and damages, upon the damages decreed by that court.

WHEN A COURT OF EQUITY WILL NOT RELIEVE AGAINST A JUDGMENT AT LAW, see note to *Yancey v. Downer*, 15 Am. Dec. 35, and cases there cited.

BLIGHT'S HEIRS v. BANKS.

[6 T. B. MONROE, 192.]

EQUITY JURISDICTION.—A court of equity has jurisdiction to compel original grantors to execute deeds of confirmation, where the parties through whom the complainant claims title, have lost or failed to register their deeds; and it will interfere to remove difficulties in land titles when a party can not readily proceed at law, when the conveyances are lost or in the hands of the opposite party, or when the parties are numerous and the proof hard of access; and generally to remove incumbrances and claims calculated to disturb the possession of the complainant and to lessen the value of his estate.

EJECTMENT BILLS.—The court will, on ejectment bill being brought, in such cases, clear a title purely legal, and also decree possession.

DEEDS EXECUTED ABROAD may, under the statutes of this state, be registered here within eighteen months.

DEFECTIVE REGISTRY OF DEED.—Where a certified copy of a deed, and not the original, is recorded, the registry is defective; but a court of equity has power to remedy such defect.

VENDOR'S LIEN.—Where a portion of the land, subject to the vendor's lien, remains unsold in the hands of the original purchaser, that part must first be subjected to the discharge of the lien, and if it be sufficient for that purpose, the portion sold, even in the hands of a purchaser with notice, will be held free from the lien.

WHERE ALL LANDS SUBJECT TO A VENDOR'S LIEN are in the same situation, the different parts sold must contribute ratably to the discharge of the lien.

LIEN FOR PURCHASE-MONEY can not be enforced against a sub-purchaser for a valuable consideration, without notice.

TAKING PERSONAL SECURITY FOR PURCHASE-MONEY destroys the vendor's lien.

IT IS NO DEFENSE IN A SUIT TO OBTAIN DEED OF CONFIRMATION, that the defendant was not paid the purchase-money, where it appears that complainant claims under defendant's grantee for valuable consideration, without notice.

VENDOR RETAINS NO LIEN FOR PURCHASE-MONEY on the claim of his vendee, where, after the sale to him, the vendor asserts title in himself, and conveys the same land to another.

LANDS, BUT NOT CLAIMS TO LANDS, will be sold by a court of equity, to discharge liens.

PUBLICATION OF AN ORDER FOR TWO MONTHS, as required by statute, is sufficient, although such order directed its publication for eight weeks only.

DEPOSITIONS ADMITTED IN EVIDENCE BY STIPULATION of a party to the suit, who is afterwards appointed the agent of another party to manage such suit, and whose prior acts were ratified and adopted by such other party, may be read in evidence against the latter.

TO CONSTITUTE A PERSON A PURCHASER FOR A VALUABLE CONSIDERATION, without notice, it is necessary that he should have paid the money and obtained a conveyance before notice.

SALE UNDER EXECUTION AGAINST THE HOLDER OF AN APPARENT EQUITY only does not affect the holder of the legal title who was not a party to the suit; an equitable title can not be sold under execution.

DECREE RENDERED ON INSUFFICIENT PUBLICATION does not bind the parties thereto; and ratification of such decree pending the suit is ineffectual.

TAX SALES OF CERTAIN SPECIFIED QUANTITIES OF LAND, supposed to embrace the whole tract, will not support a conveyance of the entire tract which subsequently turns out to be of greater extent.

TAX SALE OF LAND ON WHICH NO TAXES WERE DUE conveys no title.

THE RECORD MADE BY THE OFFICER of the quantity of land sold by him for taxes prevails over the certificate given to the purchaser.

THE QUANTITY CERTIFIED BY THE OFFICER to have been sold by him is *prima facie* correct.

AN UNPERFORMED AGREEMENT which remains a cloud on title to land will be rescinded, and a release thereof decreed.

PAYMENT OF COSTS.—Parties defendant in a suit to quiet title to lands, who contest the plaintiff's right will be compelled to pay the costs of the contest by them unnecessarily enlarged and increased.

AFFIDAVIT FOR ORDER OF PUBLICATION against persons sued as unknown heirs, must be made by the complainant himself, unless it appear why he could not make it.

CROSS APPEALS from decree in chancery. The opinion states the case.

Talbot and Darby, for Blight's Heirs.

Haggin and Mayes, for Banks.

Monroe, for Lewis' Executors.

By Court, MILLS, J. A patent for one hundred and thirteen thousand four hundred and eighty-two acres of land issued from the commonwealth of Virginia to Henry Banks and Richard Claibourne, as tenants in common, which forms the subject of the present controversy.

Samuel Blight filed his bill in the court below, claiming the title thereto, by the following chain of conveyances: A conveyance for five thousand two hundred and seventy-seven acres thereof, as the quantity is styled in the face of the deed (but as the boundary described in the deed shows upwards of twenty thousand acres), from Henry Banks and Richard Claibourne, the patentees, dated in 1787, to Pierre Louis Philippi Galbot De Lomerie, and also a deed of confirmation of the same land to De Lomerie by the same patentees, dated in 1799.

A conveyance from De Lomerie to Blight himself, which completes the claim as to that quantity.

As to the residue of the tract, which forms the principal controversy, he sets out the following: A letter of attorney from Henry Banks to his copartner, Richard Claibourne, authorizing him to sell and convey all his interest in this and other lands, dated on the twenty-fifth of January, 1786.

A conveyance from Richard Claibourne for himself, and as attorney in fact for Henry Banks, dated sixth of January, 1794, of the whole residue of the tract, to James Trenchard.

A conveyance for one third of the same tract, from Trenchard to Burges Allison, dated twenty-eighth of November, 1796.

A conveyance from Thomas Campton, William Tilghman and Joseph Hopkins, commissioners of bankruptcy, under the late law of the United States on that subject (Burges Allison having been under a commission issued for that purpose, previously declared a bankrupt), to Thomas Ervine and Samuel Jones, as assignees, dated twenty-seventh of February, 1801.

A conveyance from Thomas Ervine and Samuel Jones to John Keighan, dated second of June, 1803.

A conveyance from Keighan, dated on the same day with the latter, to the said Thomas Ervine and Samuel Jones, as individuals.

A conveyance from said Thomas Ervine and wife, to said Samuel Jones, for his moiety of the third undivided, dated fourth of September, 1809.

A conveyance from said Samuel Jones, dated on thirtieth of November, 1809, to Samuel Blight, the complainant, which, in

addition to the conveyance from De Lomerie, completes his claim to De Lomerie's part and an undivided third of the residue.

For the remaining two thirds which we, according to this statement, have left in James Trenchard, he sets up the following conveyances:

Two conveyances from said Trenchard to David Allison, dated twenty-eighth of November, 1796, each for one third of the tract.

A conveyance from David Allison to William Shannon, dated on the eleventh of June, 1797.

A conveyance from William Shannon to Guy Bryan, John Lyle and John Fries, dated on the thirteenth of November, 1809.

And finally, a conveyance from said Bryan, Lyle and Fries to Samuel Blight, the complainant, dated twenty-third of October, 1809.

In his original bill, he makes the patentees and all the intervening grantees parties, and states that none of these conveyances, except those to himself immediately, have been proved or acknowledged or recorded as the laws of this country direct; that, of course, the title remains in jeopardy from creditors and innocent purchasers, and that it is with great difficulty that any title can be established at law, because the conveyances can not be given in evidence without parol proof; that some of the witnesses are dead, and some of the original conveyances are lost and can not be found, and he prays that his title may be rendered complete as a recorded title by the decree of the chancellor.

Banks, the patentee, answered, and against the rest of the aforementioned parties the bill is taken as confessed, after publication made. We shall have occasion to notice the contents of the answer of Banks, or rather of his different answers, as there are several, as we progress with the cause. The first question made in his favor is the jurisdiction of a court of equity. It is asserted that such defalcations in completing a defective title, are generally the fault of the grantees, and that equity will not sustain a bill for such purpose. On this point we will not long dwell; for we can not doubt the propriety of the interference of the chancellor in such case. Equity will frequently interfere to remove difficulties in land titles; where a party can not proceed without difficulty at law; where the conveyances are lost, or in the possession of the opposite party; or where the parties are numerous, and the proof hard of access; and in

many such cases it will lighten the burden, and settle many controversies, and bring them into a small scope.

And where the title is purely legal, for such and similar causes to those we have enumerated, equity has carved out a branch of jurisdiction and a class of bills, termed in the books ejectment bills, in which, not only the title is made clear, but the possession decreed also. No reason is perceived by us why the present case is not within the spirit of these cases. The difficulties in an unrecorded title, especially if it is derived through a long chain of conveyances, are familiar to our courts in this country. The danger to which the title is exposed from two classes of persons, creditors and subsequent purchasers, is often great, and the facilities afforded from a title which can be read in evidence, without other proof than the authentication annexed, are felt by every one who has to bring his title into court for attack or defense, and the present case will furnish a good comment on the propriety of the interference of the chancellor. As to the default of the grantees, in not having their title properly recorded, it may furnish a good reason for taxing them with the costs of renewing the title, provided the defendants make no opposition to a confirmation of title.

The next point relied on is that there is no proof of the different conveyances set up by Blight, and that Banks has not admitted them in his answers, taking them in the mass. On this point we are unable to reconcile all the different answers put in by him. In the first, he neither expressly admits or denies them; in a second he expressly admits them, but requires his adversary to compound with him, and admit some of his affirmative statements in return; and in a third he goes so far as to say he does not admit or believe they were made or executed. But independent of his admission in one of his answers, it is impossible to read any of them, and not perceive that the writer labored under a weighty consciousness that the following deeds and documents actually exist, and are genuine, to wit: the letter of attorney from him to Claibourne; the first deed of Claibourne to De Lomerie; the conveyance from Claibourne to Trenchard; and the conveyances from Trenchard to both Burges and David Allison.

In addition to this, the deed of confirmation from Banks and Claibourne to De Lomerie, in 1799, which Banks does not pretend to dispute, not only alludes to the power of Claibourne, but also, in express terms, recites and declares the fact of the conveyance from Claibourne to Trenchard, which had then

taken place after the first, and before the second deed to De Lomerie, and there is an express stipulation that the patentees had conveyed to none other except Trenchard, in which the part of De Lomerie was excepted; and we may add that in a schedule rendered by Banks, when he took the benefit of the insolvent laws of Pennsylvania, and which he now sets out and relies on, there is an express acknowledgment of the conveyances from Trenchard to David and Burges Allison. To this point, therefore, the title of Blight is indisputable.

The deed of confirmation from Banks and Claibourne to De Lomerie was acknowledged in proper time and manner before the mayor of Philadelphia, and certified by him under the seal of the corporation, which did entitle it to record in this state under our acts of assembly; if it had been offered in proper time to the proper office. It was recorded here in due time, that is in less than eighteen months, which has been held by this court the correct time for conveyances made abroad for lands in this state, under the proper construction of our laws regulating this matter: See *Taylor v. Shield's heirs*, 5 Litt. 295.

But we discover that by the certificate of the recording officer in this state, an authenticated copy of the deed, and not the original, was presented to and recorded by him, which renders the registry of the deed defective, and entitles Blight to come into a court of equity to remedy this effect. His own deed is made and recorded in proper time, and we shall for the present leave the part of De Lomerie, until we consider the defects of the other deeds to the remaining part of the land.

As to this sale from the patentees to Trenchard, Banks makes the same defendants to his answer which Blight had made in his bill, as well as others, and also makes Blight a defendant to his answer, and charges that the land when bought by Trenchard was not all paid for, and that there was a balance due, and exhibits a bond for upward of eight thousand pounds sterling, with some credits thereon indorsed, executed by Trenchard, Burges Allison, and Joseph Barnes; by Trenchard, as agent, and he claims a lien upon the land for this sum, and that if the debt is not paid to him the land may be subjected thereto if the title is not released to him, which he first requires; and one of the most important questions made is on this lien.

We have already seen that the title is established from the patentees to David and Burges Allison, and it has been insisted that as the bill is taken as confessed against the rest, the confession is sufficient as against them and all concerned. It will

be admitted that the confession is clear evidence against the defendants, who are silent, and indeed as to all others whose interest can not be prejudiced by the confession.

As the tide has passed from Banks and Claibourne, it is evident that they have no right to interfere with the fact admitted by the answers or silence of other grantors, unless they shall make out a valid lien, and the admissions of the defendants against whom the bill is taken as confessed, shall operate against his lien, in which case their silence can not prejudice him.

We must therefore notice this lien. It has no bearing on the part sold to De Lomerie, as his part is evidently paid for, and only applies to the residue of the tract, sold to Trenchard. We shall not notice all the objections made to this lien in argument, but shall barely observe, that although the note itself, has no connection on its face, or by its face with the conveyance to Trenchard, as the deed is dated some time before the note, yet the deposition of Burges Allison, which is used, states the note was given for this land; and Banks says in his schedule before alluded to, that it was given for this and other lands sold at the same time. At the time Trenchard purchased this tract he bought also many other tracts in Harrison county, Virginia, amounting in the whole to about one hundred and fifty thousand acres, which were included in the same deed to Trenchard. What has become of these lands nowhere appears in this cause; whether Trenchard yet retains them, or whether they are now in the hands of purchasers, either with or without notice, is not shown, and equity would not enforce the lien against even a purchaser with notice, while there was enough of the lands remaining in the hands of the original purchaser to satisfy the demand. On this the lien ought to fall, and it is evident that this bond was given for all.

The furthest, therefore, it could extend to this tract would be ratably only, if all the lands were in the same situation. We have already settled the fact of title in David Allison in two conveyances. His purchase seems entirely unconnected with the purchase of Burges Allison, and there is no proof in the cause tending to fix notice on him that Trenchard owned any part of the purchase-money. The conveyance to Trenchard not only acknowledges payment on its face, but by a receipt in full, written on the deed, payment is fully acknowledged; David Allison had, therefore, a right to take the fact of payment as true, and must be presumed to have done so, unless it

is proved that he was expressly warned of the contrary. All the part, therefore, of David Allison, must be held to be discharged from this lien, if it exists at all. For no principle is better settled than that a lien for the purchase-money, which is a creature of a court of equity, can not be enforced against a purchaser for a valuable consideration without notice. Blight, therefore, has a right to read, on the admission made by taking the bill as confessed, all the conveyances from David Allison to him, free from the objection of Banks, who can not be injured thereby, as he has lost his lien, if any he had, by the purchase of David Allison.

It has been urged in argument, that Banks is only a defendant resisting a recovery against him, and that in this attitude equity will give no relief against him, as to the title to this land, if the money is not paid. If Blight held an equity only, and was endeavoring to enforce it, this might be true. But his situation is otherwise. He holds the legal estate, and only prays that the evidence thereof may be made more safe and credible than they are. To refuse him any aid because Banks has never been paid, might prejudice him, and could never aid Banks, as he, on his cross-bill could not enforce his lien, because none exists. Blight, therefore, being clearly entitled to the share of David Allison, as well as that of De Lomerie, the quantity which the supposed lien could reach is greatly lessened, as well as that portion of the debt which could reach it.

The part of Burges Allison, therefore, only remains to be considered. He had notice that the debt was not paid, and we need not say that the commission of bankruptcy against him would destroy it; for we can not admit that this debt is any lien at all. Difficulties exist against it, owing to the lapse of time, and the presumption against it from that quarter; and it is in proof that part of the land, at least, has been held in possession under the purchase of Trenchard ever since the year 1795.

But this is not all. Burges Allison was not a partner with Trenchard, according to his own testimony, as well as the exhibits in the cause, in the original purchase. He was then unknown to Banks and Claibourne. He afterwards agreed to become interested with Trenchard by contract with him, and Claibourne accepted him in the bond in all respects as a security. Barnes also had his hand and seal affixed by Trenchard, which was designed as a further security. But whether Trenchard had or had not authority to do this, we need not in-

quire. The security of Burges Allison is enough. The security of a bond from the purchaser alone was held sufficient formerly to destroy the lien. This has since been often overruled; but it is still maintained by all the cases, that personal security removes the lien, and that by accepting it, the seller waives the lien, and others knowing this, may purchase with safety. Another fact renders it evident that Allison was a surety. As we have observed, the bond was given for this and other lands also, in which Burges Allison had not the most remote interest or claim. Why, then, did he unite in the bond to secure more than what he himself owed, if it was not as surety for Trenchard? Nor will the attitude of Banks, as a defendant not yet paid, against a holder of the legal estate, help him in this respect. The application is not made to get the legal title from him, but only to renew evidences once existing, and held free from any lien which he might have retained. There is then no difficulty in Blight reaching his titles down to himself, on the admission made by the silence of the other defendants. But we may add to this, that the exhibits or conveyances from the commissioners of bankruptcy, down to Blight, are proved by the depositions in the cause.

We are aware that exceptions have been taken to the orders of publication. In the original record they may not be complete; but they are shown to be so by the additional record brought up by certiorari. One of the orders, it is true, directs the insertion to be made by the editor, eight weeks only, instead of two months, and it has been frequently held by this court, that proof of insertion for eight weeks only is insufficient. But the proof is clear that the order was, in fact, inserted two months in succession, and it has never been held, that if the order said eight weeks, it vitiated the publication made the proper length of time. The note of the time of insertion in the order, is designed as a direction to the printer, and is not essential to the validity of the order, and if the printer, knowing that this direction to insert it is not long enough to comply with the law, shall continue the publication for a sufficient length of time, no reason is perceived for holding the publication defective.

It has also been urged, that as all the bills were dismissed in the court below *pro forma*, and an agreement added to the decree, that the cause shall be tried here, and the same objection be made to evidence here as could have been made in the court below, the depositions to which we have alluded as proving the

exhibits can not be read, because they were taken to be used in another cause and another court, and copied and filed here, and that Banks has never agreed that they shall be read.

But there is an agreement made that they shall be read here by another party, which it is insisted must be extended to Banks.

This introduces another character or party, not heretofore noticed, and we will proceed to give a succinct history of his claim and standing, and with this objection to the deposition, consider the other questions arising out of his case.

Banks appears to have drawn an order in favor of Abraham Morehouse for fifty thousand dollars, to be paid in lands in Kentucky, on his agent Cuthbert Banks, residing in Kentucky; Cuthbert Banks discharged part of this order in lands, the balance was assigned by Morehouse to P. H. N. Tot Bastrop, who applied to Cuthbert Banks, the agent, for the payment thereof; and Cuthbert Banks, by articles of agreement or executory contract, in the year 1800, sold the tract now in contest, with others, to Bastrop, who immediately, or in the same year, mortgaged them to said Morehouse, to secure him in the payment of a sum of money expressed in the mortgage. On this mortgage Morehouse filed his bill against Bastrop in the late Danville district court, and obtained a decree of foreclosure and sale, at which John Blanton bought this tract of one hundred and thirteen thousand four hundred and eighty-two acres. The executors and heirs of John May having a judgment against Blanton, sold this tract of land by execution against him, and Thomas Lewis became the purchaser thereof, and obtained the conveyance of the sheriff. Lewis then filed his bill in the Hardin circuit court, against Henry Banks and Claibourne, to compel them to convey a title, and having advertised against them as non-residents, obtained a decree for the whole tract, and a conveyance was accordingly made to him, by a commissioner appointed by that court. Henry Banks, some time after this decree, filed his bill of review to set aside this decree of Lewis, and at the hearing thereof, the same court reversed and set aside this decree at the prayer of Banks, and annulled the title of Lewis. Lewis and H. Banks then made an adjustment of their controversy, in which H. Banks released all his title in this tract to Lewis, and agreed that the decree on the bill of review should be set aside, and the first decree reinstated, which was accordingly done by the court.

This latter proceeding took place pending this suit. Lewis appeared in this cause and prayed to be made a defendant or a

party thereto, which was granted to him, and he filed a cross-bill against both Blight and Henry Banks, praying that each might be compelled to convey and release their title to him, which was answered by both H. Banks and Blight, and this was tried and decided by the same decree which we are now revising, and the bill of Lewis was dismissed; he having previously departed this life, the suit was revived in the name of his executors and devisees.

Blight, on discovering the friendly manner in which H. Banks had released his title to Lewis and ratified the decree, which had been reversed in the bill of review, filed an amended bill in this cause, suggesting that both H. Banks and Lewis had entered into a combination to defraud him, and that an article of agreement to that effect and for the purpose of embarrassing his title existed between them.

In their answer they exhibit the article, in which they agree that Banks had conveyed all his title to Lewis, and that their claims should thus be united, and that they would sell the land and divide the proceeds equally between them so soon as, by their united effort, they could defeat Blight in this suit. In the same article it is stipulated that the whole control and management of this suit shall be given up to Lewis, in as strong terms as can well be expressed, and all that Lewis had done or should do in the cause was ratified and declared to be binding on H. Banks.

Now, before this time, Lewis had made an express written agreement in this cause, that the depositions now objected to should be copied, and filed, and read in this controversy. This agreement must have been known to Banks at the time he solemnly submitted his case to the management of Lewis and conveyed to him. Indeed, by this agreement, Lewis or his devisees must be taken as H. Banks himself. They hold the title of Banks, such as it is, one half for themselves and the other half as trustee for Banks, except certain parts which Lewis had previously agreed to part with to others, which he reserves wholly for himself. Of course, if these depositions can be read against Lewis they can be read against Banks also, for his claim, as well as the fate of his case, is vested in Lewis by his own act yet binding upon him.

It is true that before this cause was tried, Banks appears to have rued this contract, and files an answer in the nature of a cross-bill against Lewis's devisees and executors, praying that this contract with and conveyance to Lewis may be set aside,

alleging that Lewis, when he made this contract, had defrauded him, as he alleges was the case in all his different sales of this land, from that to Trenchard, in 1794, to this with Lewis, in 1818, by representing that he, Lewis, possessed and held the claim of Blight. This is denied by the answer of Lewis's executors, and we do not well perceive how it can ever be proved, because the writings between them expressly show that neither Lewis nor Banks had Blight's claim, and that they were struggling to defeat it in this suit, and that the design of their agreement was to make their united effort bear more forcibly against it. It is true that this part of this controversy between Banks and Lewis's devisees is still retained in the court below to be hereafter decided, and we are not now to decide it, but are bound to look into it so far as it may have a bearing on the other parties to this suit; and looking into it for this purpose alone, we perceive nothing that weakens its obligation on Banks, or that will prevent us from considering Lewis as Banks; as he has vested his claim in Lewis's hands, of course these depositions must be read.

Here we are furnished with another decisive refutation of the lien set up by Banks. He has made a disposition of all his claims, both legal and equitable, to Lewis, totally incompatible with a decree selling this land for the purchase-money. Lewis is to have certain parts thereof exclusively to himself, and then is to hold one half of the residue. There is no way of making this supposed lien effectual, consistent with his disposition to Lewis, but to make it operate exclusively on the claim of Blight, and expose it to sale, leaving Lewis to reserve his claim as well as that of Banks.

A court of equity will sell lands in discharge of liens, but not claims without the land, and to offer this land to purchasers, all claims must be brought into market. At all events, this contract with Lewis shows the estimate placed by Banks himself; as well as Lewis, on this lien. He did not esteem it as valuable as a union of strength with Lewis, for the purpose of defeating Blight entirely, and supposed the half of Lewis's claim, aided by his skill, was worth more than his claim on the bond set up by him as a lien upon the land.

The question now occurs, what is to be done with Lewis and his title? Is he to be excluded from all participation in the contest, and excluded from it holding his title, or must he be retained and compelled to surrender it? If he had remained in the same situation in which he appeared when he voluntarily

brought himself into the controversy, he might be excluded. But he, or his representatives, now appear clothed with the claim of Banks as well as other claims to fortify it, claiming the land, and actually disturbing the possession; and Blight has, by an amended bill against him, claimed to be relieved of this burden on his title also, and that his claim may be released. To grant this relief against him is within the jurisdiction of the chancellor. The bill of Blight has become in this respect still more like an ejectment bill, and is framed, not only to renew and simplify his evidence of title, but to remove incumbrances and claims calculated to annoy his possession and lessen the value of the estate, and he is entitled to this relief, unless something is found in the claim of Lewis to forbid it.

The sale to Bastrop can not stand in the way, because it was not only long after the sale to De Lomerie and Trenchard, but was by executory contract only, and did not make Bastrop a purchaser for a valuable consideration, without notice as to Trenchard and De Lomerie; to do this, it was necessary that Bastrop should not only have paid the price, but have received a conveyance, ignorant of the former sale of the patentees, and the proof shows that he was informed of it.

The decree of the Danville district court can not oppose this relief, because the mortgage of Bastrop to Morehouse was of a supposed equity only, and the decree and sale thereon could pass no more. Neither Blight nor any under whom he claims, were parties to that suit, and can not be more affected by the decree than they would by a private sale by executory contract.

The sale by execution to Lewis against Blanton, the purchaser under the decree of the district court, can not defeat Blight, or give title to Lewis, because Blanton had at best an apparent equity only; and it has been repeatedly held that an equity can not be sold under execution.

The decree of the Hardin circuit court, in favor of Lewis against Banks, can not resist this relief, although it was obtained before the commencement of this suit, because Lewis was apprised of the title of Blight, as appears in the proof, before he received his deed under that decree; and on looking into that record we discover that the order of publication was not made the length of time required by law, and of course, according to the decisions of this court, the decree itself can have no operation on those who were not parties; and Blight and those from whom he derived title were not parties.

Nor can the ratification of that decree by Banks, and his con-

veyance to Lewis in pursuance thereof, defeat the relief prayed by Blight against Lewis, because this was done pending the suit, and with the avowed design of defeating its operation.

But as to the part sold to De Lomerie, Lewis sets up a different claim from any heretofore stated. He produces the conveyance of the register of the land-office under a sale for taxes as the property of De Lomerie, made to Charles Helm, and from Helm to himself, of the whole tract, by the bounds of De Lomerie's deed. It seems that the tract was listed for taxes in the name of De Lomerie, at the quantity of five thousand two hundred and seventy-seven acres, the nominal quantity in his deed. One sale was made by the register and was returned by him to the auditor to be one thousand nine hundred acres off the western end, and the sale of that quantity was recorded by the auditor. This return and record seems to have been since changed to four thousand nine hundred acres, and with this the register's certificate recited in the face of the deed agrees. Afterward a subsequent sale was made of three hundred and seventy-seven acres, supposed to be the balance of the tract, and these two sales are combined by a subsequent register in the same deed, and the whole tract is conveyed by the register's conveyance, according to the boundaries of the deed, from Banks and Claiborne to De Lomerie, including upwards of twenty thousand acres.

For it is evident that the conveyance of the register of the whole tract is not good. For, waiving the question whether the purchaser would not be compelled to take his first purchase in quantity, laid off first at the west end, and then his second purchase in its proper place, which would probably be the correct mode, it is clear that the two sales could not be combined, because the conveyance, according to the second sale, ought not to have been made. Blight had redeemed it and paid the taxes thereon, and obtained a quietus, and it must have been owing to the oversight of the officers that the conveyance was made. This vitiates the conveyance as to the whole tract, and if good for any part, it can only be for the first purchase. There is some difficulty in ascertaining what that purchase is.

The certificate of the register recited in the conveyance, who was not the register who made the sale, is four thousand nine hundred acres, while the quantity returned sold by the register, and recorded in the auditor's office, is one thousand nine hundred acres, and which of these is to prevail is the question, as the entry and return of the sale by the register

and record of the office required by law, is kept in the custody of the officers of the law, and the certificate is kept by the party, and operates as a mere memorandum, directory to the surveyor, and has no validity in passing title, we concede the preference to the record, and conceive it ought to prevail as fixing the last quantity; although the return of the register and record of the auditor has been since changed by the auditor to conform to the certificate, yet this change was not authorized, and we can not deem the sale valid for more than one thousand nine hundred acres, to be taken off from the westwardly end of De Lomerie's survey, by a line parallel to the most westwardly boundary, terminating on the Ohio at one end, and the line of De Lomerie's survey, which runs parallel to the river, including the proper quantity, and the devisees and executors of Lewis must release all but that boundary.

Whether the deed from the register already obtained, as it includes the land really sold, as well as other lands which it ought not to have included, is valid as to the part really sold, we need not inquire.

But we predicate our decision on this point, on the fact, that so much was really sold, and as there is no evidence impeaching the sale, it must be held as *prima facie* correct, according to former opinions of this court.

Another objection to granting any relief as to this part of De Lomerie, is the extraordinary surplus contained therein, and it is urged that ought to raise a presumption of fraud. We say presumption, because there is no other evidence of fraud. To this we reply, that this presumption is destroyed by its also appearing on the face of the deed itself, that it contains within its boundaries more than the quantity named, and the reason of the boundaries being enlarged is reasonably accounted for by showing that there were other claims in the names of others, within that boundary, supposed to be superior, and it is reasonable to suppose that the parties intended to include that quantity after these claims were excepted; and therefore they enlarged the boundary, and it is shown that the quantity conveyed will not greatly exceed the quantity named, after these claims are deducted.

We therefore conclude that the sales made by the patentees of this tract of land now held by Blight's heirs, must prove successful over all the subsequent sales and conveyances of the same land, with the exception aforesaid, as they are the oldest, and are unimpeached, and were completed by conveyances of

the legal estate, good against all except two descriptions of persons, creditors and innocent purchasers.

There is still another incumbrance on the title of Blight not yet noticed, which he seeks to remove by an amended bill. In the deed from Claibourne and Banks to Trenchard, the part before sold to De Lomerie was excepted; but Trenchard, in his subsequent conveyances and dispositions of the land, did not make this exception, and undertook to convey the whole, including the part of De Lomerie; and before he sold to David and Burges Allison, he laid off a town upon the part of De Lomerie, probably by protraction only, with both in and out lots marked thereon, and also on the same diagram, divided the whole tract into farms of five hundred acres each, and contracted with Coburn Barrett, Henry Servantes and David Barbour, that they should come to the land, or one of them, and bring upwards of two hundred families, who should settle the lands, as tenants or lessees, on an annual rent. Each settler who should settle and faithfully pay his rent for seven years, and clear a certain quantity of ground, was to be entitled to lots in the ideal town named Ohiopiomingo, which were to be allowed them, and to Barrett, Servantes and Barbour, certain portions of land were to be allowed for the performance of the stipulations on their part.

An attempt was made to perform this agreement. David Barbour arrived on the land in 1795 or 1796, with sundry families, though not near enough to comply with the contract, most of whom settled down at the mouth of Doe Run, on the site of the town of Ohiopiomingo, and some attempts were by Barbour to make the requisite leases. Subject to this arrangement, Trenchard conveyed to David and Burges Allison. Most of those settlers became dissatisfied with their new situations, and were disquieted by other claims appearing on the land. As they were from Europe, it is probable that some of them were dissatisfied with the wilderness into which they were led, and found themselves in a country where unsettled lands could be had in abundance without rent. They therefore began to transfer their possession to others until all, or nearly all abandoned the enterprise. Barbour stayed on the land for several years, endeavoring to recruit his settlement. Some of those settled on the land, and that outside of the claim of De Lomerie, remained thereon, or those claiming under them, till Blight himself entered, in 1810, since which time he has been possessed by himself or tenants; and now, in his amended bill, he makes Bar-

bour, Barrett, Servantes, and some who claim under them, or their representatives, where any of them have died, defendants, and prays relief against these contracts of Trenchard, and requires them to be surrendered, on the ground that the enterprise failed, and there was a total failure on the part of Barrett, Servantes and Barbour, to comply with their contracts. We perceive no objection to granting this relief also, as this contract is a dormant burden on his title, and may affect the enjoyment thereof, or lessen its value, and the proof is clear that the contracting parties only attempted, and utterly failed to comply with their stipulations, and that they have done nothing to entitle them to a conveyance of any portion which they might have been entitled to by a compliance.

One other question has been made in argument worthy of notice. It is insisted that if Blight or his representatives shall be found entitled to a completion of his title by a proper registry of conveyances it ought to be granted at his cost, as the non-registry of these deeds was not owing to the grantors. As before observed, if the defendants had met his application to a court of equity by a willingness to perfect his title, it would, no doubt, have been equitable to have left the costs on him. But in this case a different rule must prevail with regard to the defendants, Banks and Lewis' devisees and executors. Banks has, by subsequent transfers of this land, embarrassed it to the great prejudice of his first sale. Lewis has bought up one claim after another, still knowing of Blight's, and finally they formed a union for the purpose of more effective opposition, and through every stage of the cause Blight has met with the most decided resistance, until the record is swelled to an inconvenient and unusual size. Under these circumstances we can not say that either Lewis' representatives or Banks can escape from the burden of the contest unnecessarily enlarged and increased.

Upon the whole case, therefore, the decree of the court below, so far as it dismissed the cross-bills of Banks and Lewis' representatives, must be affirmed, with costs; and so far as it dismissed the bill of Blight, whose heirs now prosecute it, he having died pending the appeal, it must be reversed, with costs, as to Banks and Lewis' executors, and the cause be remanded, with directions to the court below to enter up a decree against all the defendants, that they release and convey to Blight's heirs all the tract of one hundred and thirteen thousand four hundred and eighty-two acres of land, with the exception of one thousand nine hundred acres, based on the whole extent of the western

boundary of De Lomerie's deed, and extending with his line eastwardly on one side and with the Ohio river on the other, till a line parallel to the base shall include that quantity.

Banks must pay the costs of his appeal, and Banks and Lewis' executors and devisees the costs of Blight's appeal.

A petition for rehearing having been filed by defendants' counsel, the opinion thereon was delivered as follows:

By Court, MILLS, J. In pursuance of the petition for a rehearing, we have reviewed the former opinion in these appeals, as well as re-examined the extraordinary and confused record, and do not feel willing to retract a single principle before advanced. The opinion, it is true, is written with a "running pen," and, indeed, necessarily so, lest the long detail of facts necessary to be recited, when added to a lengthy discussion of the principles involved, should swell the opinion to an extraordinary length.

Our attention is again invited to the main points, to wit, the jurisdiction of a court of equity over the bill, and the lien claimed by Banks upon the land. It is true that bills to make legal titles which are valid against all the world, except two descriptions of persons, recorded titles, and thus to protect them from creditors and innocent purchasers, have not been frequent. But if such bills can not be allowed under one state of conveyances, it must certainly be said that there is a defect of justice in our country. A court of common law can give no relief in such a case, and if equity can not do it, then is the case a hopeless one.

If, however, the principles which govern courts of equity are examined, it will be found that there are many circumstances in this case, independent of defective conveyances, which sustain the jurisdiction. Courts of equity will aid titles defective in the formalities of law, supply deficiencies, and even enforce legal titles where the evidence can not be got at, in a court of law, and even where it can, if many suits can be prevented, or where the title is much entangled, equity will entertain jurisdiction of the matter. If these and other principles of the jurisdiction of courts of equity are scrutinized, and this record is examined, the mind must be skeptical, which still contests the jurisdiction.

As to the lien claimed by Banks, it is still less tenable. He had personal security, and the present holder of the legal estate is an innocent purchaser. Liens of this nature do not follow unregistered more than registered conveyances; and

why must he have his lien, when he is not asked for a title, but to furnish those who claim under him with a recorded deed? Barely, it is said, because he is a defendant. If he be a defendant, must he be permitted to do iniquity before he does equity? A. sells to B. a tract of land, and conveys it by an unrecorded deed, but takes personal security for the price. B. sells to C., who is ignorant that anything is due to A, and also conveys by an unrecorded deed; C. loses both deeds, and comes into a court of equity, to be relieved from the accident. A. refuses relief until he shall pay him the price of the land; not on the ground that he has any right to it in law or conscience from C., but because he is a defendant; and C., because he is complainant, must suffer gross injustice; must with his deeds lose the price of the land. To state such a proposition, refutes it.

It is insisted that we ought not to bind Banks by the agreement of Lewis, to read depositions admitted by Lewis, because the written agreement of Lewis is not proved, and this is insisted upon, because the cause under the agreement of the parties is to be tried here as it would have been in the court below. We might almost as well be told that we ought not to admit bills or answers, unless they were first proven to be genuine. If the parties have supposed that this consent could give original jurisdiction to this court, they were mistaken. A written agreement, touching the management of the cause, filed by the parties and signed by themselves or counsel, where the court below knows the handwriting, or can bring the parties before it, are read as much in causes as the pleadings, and if it is to be questioned here, and the original papers are to be brought up, and their genuineness to be here proved for the first time, by living witnesses or new depositions, then we would be converting this court into one of original jurisdiction, and we disavow such a power. We conceive the depositions are admissible under this agreement, and that both Lewis' representatives, as well as Banks, under his agreement with Lewis, are bound by them, and the agreement was not questioned below.

But various objections are taken to the orders of publication, as not authorizing the bill to be taken as confessed against absent defendants, and that without the confession, many of the intermediate conveyances can not be read against Lewis or Banks. It is true the opinion is expressed that the silence of the absent defendants, or their tacit confession, might be used against Lewis and Banks, so far as they had no interest affected by the confession, and so we still suppose; but on a more criti-

cal examination of the record and the decree rendered, it will be found not necessary to resort to this principle, except with regard to one single conveyance. It ought to be recollected that these absent defendants are not complaining, nor are the appellants; but it is Lewis' devisees and Banks who complain for them. As the whole of the conveyances, to be used from these absent defendants, pass the legal estate, and the objection is, that they are not recorded, it is not necessary that these absentees should be before the court, except to have the benefit of their confession, or to procure renewed conveyances from them, if the complainant should choose to proceed against them for that purpose; but if the proof shows that these conveyances, to and from these absentees, were executed, they can not be necessary parties before relief can be obtained against Lewis and Banks. One objection is, that the confession obtained by the complainant, is by order of publication against unknown heirs, when there was no affidavit made by the complainant, but only by his attorney or agent to obtain these orders. We will see how many of these unknown heirs were necessary parties.

In the first place the unknown heirs of De Lomerie are in this publication. They were unnecessary, because Blight has a conveyance from De Lomerie, recorded in due form of law, and the conveyance to De Lomerie from Banks and Claibourne is admitted.

The unknown heirs of Richard Claibourne are next. They are also unnecessary, because Claibourne, after his conveyances to De Lomerie and Trenchard, conveyed the whole tract to Banks, by deed duly acknowledged and recorded in the Bardstown district court, within eighteen months after its sealing and delivery, which was in due time, and places Banks in the room of both himself and Claibourne. This conveyance was not noticed in the original opinion, as not supposed necessary; but it leaves the complainant in a situation to omit him as a necessary party.

Trenchard, David Allison and Burges Allison are next, whose heirs are called upon as unknown. These conveyances are stated in the original opinion as admitted. Shannon remains as to David Allison's share of the title, and his unknown heirs are among the number. The conveyances from David Allison to him, and from him to Bryan, Lyle and Fries, are both satisfactorily proved; and as to Bryan, Lyle and Fries, they have conveyed to Blight by deed duly recorded, and they were, therefore, unnecessary parties.

Ewing, Jones and Keighan are the remaining decedents, whose unknown heirs are involved. By examining the conveyances from Ewing and Jones to Keighan; from Keighan back to them; from Ewing to Jones, and from Jones to Blight, it will be found that they were all acknowledged before the mayor of Philadelphia, and recorded in the general court of this state, within the time prescribed by law, and there was no need of bringing either them or their heirs before the court.

The only remaining conveyance is that from Compton, Tilghman and Hopkins to Ewing and Jones, the genuineness of which is not proved, and which is recorded properly, except as to the time; and the execution of it must, therefore, rest on their confession by their not appearing. They are living defendants, and against them publication has been made.

The affidavit that the publication has been made, has been objected to, because it was made after the appearance day, and one of the nine insertions in the paper proved by it might have been after the day of appearance. If this affidavit is wholly disregarded, a minute examination of the record will disclose that there is other proof of this publication, made by the editor of the paper, that the order was properly inserted. This permits the complainants to avail themselves of this conveyance.

But on re-examining these orders of publication as to the unknown heirs of Trenchard, Barrett, Servantes and Barbour, for the purpose of setting aside the leases and contracts between Trenchard on one side, and Barrett, Servantes and Barbour on the other (a branch of the case with which Banks or Lewis have no concern) we conceive that the order is insufficient, because there was no affidavit of the party to warrant it, and no reason shown why he was incapable of making such affidavit. It follows, therefore, that the complainants below will not be entitled to such decree against these unknown defendants on the return of the cause, as the original opinion directs, until these parties are brought before the court by proper publication or process, if the complainants shall see proper to proceed against them.

Upon a further examination of the decree brought before us for revision, we conceive it did not dispose of the cause finally, as to those absent defendants, although the cause came on to be heard as to them. The decree that was rendered was by consent, and it was agreed that that consent should not prejudice the rights of the parties on appeal. As the absent defendants were not there to assent, and all that was done was by consent, nothing is done yet as to them.

Their cases, therefore, or as many of them as the complainants may see cause to proceed against, for releases or other relief, are left under the power and direction of the court below.

So much, therefore, of the first opinion as conflicts with this is set aside, and the former decree and mandate of this court is to be so amended as to direct only Banks and Lewis' executors to convey the land as in the first decree is directed. The residue of the petition is overruled.

In *Tiernan v. Beam*, 15 Am. Dec. 557, it was held that a vendor's lien is not affected by making a conveyance and taking a note or bond, with personal security for the balance due; in *Kauffelt v. Bower*, 10 Id. 428, it was decided that in Pennsylvania the vendor has no lien for balance of unpaid purchase-money.

ACTUAL PAYMENT OF PURCHASE-MONEY BEFORE NOTICE necessary to constitute a *bona fide* purchase: *Jewett v. Palmer*, 11 Id. 401, and note.

In Connecticut an equity of redemption is liable to sale under execution: *Penderson v. Brown*, 2 Id. 53; in *Atkins v. Sawyer*, 11 Id. 188, it was held that an equity of redemption can not be sold under execution to satisfy the debt secured by the mortgage. See, also, note to the last case, Id. 193, and cases there cited; in *Roads v. Symmes*, 13 Id. 621, that an equitable interest can not be sold under an execution at law.

COOK v. VIMONT.

[6 T. B. MONROE, 284.]

FORMER JUDGMENT, WHEN NOT A BAR TO A NEW ACTION.—When a defendant who has obtained judgment in his favor, after the rendition thereof, admits the justice of the claim sued upon, and promises to pay the same, the former judgment is no bar to an action on such new promise.

FORMER JUDGMENT MAY BE GIVEN IN EVIDENCE under a plea of non-assumpsit.

ASSUMPSIT. Error to the Nicholas circuit. The opinion states the case.

Triplett, for the plaintiff.

Depew and Marshall, for the defendant.

By Court, MILLS, J. Vimont brought his action against Cook, and declared for money had and received; money laid out and expended for the use of the defendant, and goods, wares and merchandise, sold and delivered; and on the trial of the general issue, the jury found for the defendant, and the judgment was rendered accordingly.

He afterwards brought this action and declared in the same manner, and proved that since the judgment in the first action, Cook had acknowledged the justice of the same demand, for

which Vimont had declared in the first action, and had promised to pay the same, absolutely. The consideration was the same in both actions, but the promise to pay, set up in the last, was subsequent to the judgment in the first.

Cook offered the first verdict and judgment in evidence, in bar; but the court, on motion of Vimont, would not permit it to be used, and the jury found a verdict for Vimont, on which the judgment was rendered accordingly, to reverse which Cook has prosecuted this writ of error.

We have no doubt that the first verdict could have been given in evidence, under the issue of non-assumpsit, without being specially pleaded, and that so far as the objection to the first record rests on this ground it can not be supported. The issue of non-assumpsit is very broad, and permits almost every defense to be given in evidence, which goes to show that the defendant is discharged from the payment of the debt. Not only anything which goes to show that the consideration is vicious, or has failed, but after the consideration is shown to be a valid one, that which tends to release the defendant from the promise, such as infancy, or a release under seal, may be relied on; and the statute of limitations is one of the few exceptions to this rule. A former recovery is within the rule.

But whether the record could be given in evidence, to bar the subsequent acknowledgment and promise to pay, is the main question to be decided, and that on which this cause must essentially turn, and this must rest on the question, whether the subsequent acknowledgment and engagement to pay, is a good one, on which the plaintiff may recover, although the consideration is the same on which the original promise, which was once barred, was based.

Assumpsit is said to be an equitable action, and therefore is subject, in some manner, to the rules of moral obligation which bind the conscience; and it is a general rule, that where the consideration is a valuable and conscientious one, a promise to pay based on it will not only be binding, but will also remove any legal bars which the undertaker previously had in his favor against a recovery. Thus if in conscience a defendant ought to pay, a promise to pay, when there is a consideration, will give a remedy. If the first promise is barred by the statute of limitations, or by a discharge as a bankrupt; or the first promise was never binding, because the undertaker was an infant, or the like; such bars can not be used to avoid a subsequent promise and the demand is then recoverable at law,

because it is due in conscience. Now, by analogy to these cases, we can not doubt that if an undertaker gets an advantage by a verdict and judgment in his favor, either through the defect of proof in his adversary or a legal bar at first existing in his favor, while the demand is fair and moral, and due by the ties of conscience, and he afterwards acknowledges the original consideration, and engages to pay for it, as in this instance, the law ought to afford a remedy against him, and ought not to permit him to shelter himself under a legal bar which he had previously gained, when in conscience he ought not to have availed himself of it. On this ground, therefore, we conceive the court below was correct in rejecting the first record, and the judgment ought to be affirmed with costs and damages.

FRANKFORT AND S. T. CO. v. CHURCHILL.

[6 T. B. MONROE, 427.]

CORPORATION IS BOUND BY AGREEMENT made by the incorporators before organization, and afterwards ratified by its agents.

COURT OF EQUITY WILL ENJOIN A JUDGMENT AT LAW obtained by a corporation for installments due on subscription for capital stock by an agreement which the corporation had violated; and compel it to restore what has been paid under such agreement.

APPEAL from the Shelby circuit. The opinion states the case.

Mayes, for the appellant.

Crittenden and Talbot, for the appellees.

By Court, BISS, C. J. The persons appointed as agents to receive subscriptions of stock for the corporation, before it was organized, applied to Churchill to subscribe; he refused. To induce him to subscribe they promised and assured him, if he would subscribe, the turnpike road should be run through his land near the bed of the old road, in a manner particularly pointed out and agreed upon, to save the timber and sugar orchard of Churchill from destruction. Upon this express stipulation, assurance and condition, Churchill was persuaded to subscribe for seven shares of one hundred dollars each, payable by installments. Afterwards, in November, 1818, in the same year of the passage of the law, but how long after Churchill had been so induced to become a subscriber does not appear, to induce Churchill to pay his installments, a writing was drawn up by two of the directors, agreeing, for and on be-

half of the company, that the road should pass through the land of Churchill in a manner therein particularly specified and recognized as the condition on which he had subscribed, so as to save his timber; and agreeing on behalf of said company, that if Churchill would pay his installments that the same should be returned to him with interest, "in case the road should not run as above;" this was signed by John Willett and James Simrall, as "directors and a majority of the Shelby committee."

It seems clearly that when the company was organized and became a corporation they laid out the road differently, and very materially so, although to run through Churchill's land, yet so departing from the specification in the original agreement and written evidence of it, as to subvert and destroy the consideration which induced him to subscribe, and will bring about the evil and damage he apprehended should the road ever be actually completed.

Under these circumstances the complainant having paid part of his subscription, falling due by installments, refused to pay the residue, and brought this bill to enjoin the judgment at law obtained by the corporation for the unpaid installments, and to recover back those which he had paid; and the circuit court so decreed. The corporation prosecutes this writ of error. The proof is clear beyond doubt; the defense of the corporation is that the agents for subscriptions and the directors, Willett and Simrall, had no authority to make the terms and conditions, nor to bind the corporation. The subscription was obtained from Churchill before the corporation was organized, whilst it was in *posse*, but not in *esse*. After it was in *esse* two of the directors and a committee for managing the affairs of the company, with full knowledge of the conditions, renew the assurances by writing, reciting the whole. The witnesses to the original inducement held out to Churchill, and the conditions on which he subscribed, and the writings speak the same terms and conditions. The corporation, when organized, had notice by its directors of these terms and conditions, and receive the money; but on their part have broken the conditions and terms. Churchill now asks to be relieved from the subscription, and in the language of the agreement, to have his money back, with interest, "and he stand on the footing as though he had not paid." The doctrine contended for by the corporation can not be admitted. It can not be privileged by virtue of its invisible, intangible and immaterial existence, to practice frauds by its

agents, claim the benefit of the agreement and promise to itself, and yet deny the mutual and correlative promise and consideration held out by its visible agents. It is too late after they, the company of individuals comprising the corporate body, have received the money, with full notice of the conditions, to say they are not bound by the condition. Such a privilege would, indeed, be transcendent, and would verify the complaint of long standing and reiterated by wisdom and experience in many preceding generations, that it is difficult to obtain common justice in a dispute with a corporation.

Although the court can not change the location of the road, and compel the corporation so to complete it, it can order the the money to be restored.

The decree is affirmed, with costs.

RANKIN'S HEIRS v. RANKIN'S EXECUTORS.

[6 T. B. MONROE, 531.]

WILL OF CONVICTED FELON.—Under the common law, all the property of a felon after conviction was forfeited to the state, but by the constitution of Kentucky such forfeiture is only for the life of the offender, and therefore a convicted felon may dispose by will of all the reversionary interest in his property.

WILL. Appeal from the Bourbon county court. The opinion states the case.

Triplett, for the appellants.

Talbot, for the appellees.

By Court, **OWSLEY, J.** Reuben Rankin was charged with the murder of John Blake, and was indicted for the offense, put upon his trial, found guilty by the verdict of a jury, and sentenced to be hung by the judgment of the court.

Between the time when the sentence of condemnation was pronounced and the period fixed by the court for his execution, Rankin departed this life, having, previous to his death but after sentence, in due and legal form made and published his last will and testament, in writing, by which he disposed of all his estate. The will was afterwards presented to the county court of Bourbon for probate by the executors therein named, and though it was contested by the heirs of Rankin, it was proved and admitted to record. The heirs being dissatisfied

with the decision of the county court, have brought the case before this court for revision.

The execution of the will by the testator in legal form is not contested by the heirs, nor do they pretend that he was not, at the date of the will, of sane mind; but it is argued by their counsel that after the testator was convicted of the murder charged against him he was *civiliter mortuus*, and therefore incapable of making a valid will.

The premises assumed in this argument are certainly not without semblance of authority for their support. Lord Coke, in his Commentary on Littleton, 130 a, says that "besides men attainted in a *præmunire*, any person that is attainted of high treason, petit treason or felony is disabled to bring any action, for he is *extra legem positus*, and is accounted in law *civiliter mortuus*." But when this passage is compared with what is said by him in other parts of his Institutes, it will be perceived that this dictum was not intended by him in the full latitude of expression. In the same Institute, p. 132 a, Lord Coke seems to confine the civil death to persons professed, or who have abjured the realm, or been banished by statute or process of law; and in his third Institute, 215, he says that there is a great diversity between an attainder of treason or felony and an entry into religion. He that is attainted of treason or felony has capacity to purchase lands to him and his heirs, which he can not do who enters into religion.

In the case of *Banyster v. Trussel*, Cro. Eliz. 516, it was adjudged in an action brought against a person attainted of felony, he could not plead the attainder in bar, but should be put to answer. The same doctrine was recognized and confirmed by the court of king's bench in the case of *Ramsey v. Macdonald*, 1 Wils. 217. Foster, in his Crown Law, observes that a person attainted is not absolutely at the disposal of the crown. He is so for the ends of public justice, and for no other purpose. Until execution, his creditors have an interest in his person for securing their debts, and he is himself under the protection of the law, and to kill him is murder. He was indeed disabled to sue in his own name, but if beaten or maimed while under attainder, or if a woman was ravished while under attainder, and a pardon afterwards ensued, the party injured might maintain an action or appeal, as the case might require, for the intermediate injury: Crown Law, 62, 3. s. Other authorities of like import might be cited, but these are sufficient to prove that although a person attainted of felony may for some purposes have

been regarded as dead in law, he cannot be deemed civilly dead to all intents and purposes.

But the argument, though not to its full extent correct, does not lose its force in the present case, provided, that by his being convicted of the murder charged upon him, Rankin, in contemplation of law, became incapable of making a will, or in other words, was *quoad* the power to make a will, *civiliter mortuus*. In England, where attainder or conviction of felony works not only corruption of blood, but also a forfeiture of the lands and goods of the offender, authority is not wanting to prove the incompetency of the attainted or convicted person to make a will; but upon adverting to those authorities, it will be found that the incompetency of the attainted or convicted person to do so, results exclusively from the forfeiture, which, by the laws of that country, follows the attainder or conviction as an inseparable consequence, and from the incapacity of the person attainted or convicted afterwards to hold any estate, except for the use and benefit of the king.

Thus, in Shepherd's Touchstone, page 404, it is said, "a traitor attainted from the time of a treason committed, can make no testament of his lands or goods; for they are all forfeited to the king, but after the time he hath a pardon from the king for his offense, he may make a testament of his lands or goods as another man. A man that is attainted or convicted of felony cannot make a testament of his lands or goods, for they are forfeited; but if a man be only indicted, and die before attainder, his testament is good for his lands and goods both; and if he be indicted and will not answer upon his arraignment, but standeth mute, etc., in this case his lands are not forfeited, and, therefore, it seems he may make a testament of them."

The same doctrine is to be found in Swinb. part 11, s. 13, and in Bac. Abr., tit. Wills and Testaments, letter B. And Bacon further adds, "that however the wills of traitors, aliens, felons and outlawed persons are void, as to the king or lord, that has right to the lands or goods by forfeiture or otherwise; yet the will is good against the testator himself, and all others but such persons only."

If, therefore, the reason and doctrine of the law be correctly laid down by these authors, it will be perceived that the validity or invalidity of the will, which was made by Rankin, must depend upon the question, whether or not, by the laws of this country, he forfeited the whole of his estate, upon being convicted of the murder of Blake. If, on the conviction, the whole

of his estate was forfeited, there remained nothing which he could transmit by will to others, and, of course, according to the authorities cited, his will must be held void and inoperative; but if, notwithstanding the conviction, there was not an entire forfeiture of all his estate, according to the same authorities, he was capable of disposing of the interest not forfeited, and as to that interest, be it what it may, his will can have an operation, and must be adjudged valid.

We will, therefore, turn from the laws of England, and direct our attention to the acts of the legislature of this state, and see whether any change has been made upon the subject of forfeiture. But before we do so, it may be proper to remark, that except a provision contained in the constitution of Virginia, declaring that the commonwealth should thereafter be entitled to all forfeitures which prior to the revolution went to the king; that state seems never to have acted upon the subject until after the separation of this state from that.

The legislature of this state, for the first time, took up the subject at the session of 1796. The forty-third and forty-fourth sections of that act: 1 Dig. L. K. 413, declares, "Whenever any person shall happen to be attainted, convicted, or outlawed, of any treason, misprision of treason, murder, or felony whatever, there shall be in no case a forfeiture to the commonwealth of dower of lands, or personal estate, but the same shall descend and pass, in like manner as by law directed in case of persons dying intestate; nor shall any attainder work a corruption of blood, any law or usage to the contrary notwithstanding. Section forty-four, saving to all and every other person and persons, bodies politic and corporate, their heirs and successors, and to every of them, other than to such offender as shall be attainted, convicted, or outlawed, all such right, title, interest, entry, lease, possession, condition, profit, commodity, and hereditaments, as they, or any of them, had or should, or of right ought to have, before or at the time of said attainder, conviction or outlawry." According to any rational interpretation that may be given to this act, we admit it must be understood, not only to have deprived the commonwealth of all right by forfeiture to any estate of persons thereafter convicted of treason or felony, but also to have directed whatever right the commonwealth might have been entitled to in the estate of offenders, under the then existing laws, upon their conviction of felony, to pass and descend immediately upon such conviction, in like manner as by law directed, in case of persons

dying intestate. It was the forfeited estate to which, by the existing laws the commonwealth was entitled upon conviction of the offender, that was the subject of legislative deliberation, and which by the provisions of the act of 1796, was withdrawn from the commonwealth, and at the same time translated to others to whom it would pass and descend, in case the offender died intestate.

By the laws of forfeiture then in force, the commonwealth upon conviction of the offender, became *ipso facto* entitled to the estate forfeited, and it was designed by the legislature to translate that same right from the commonwealth, and vest it in others, in the same manner and at the same time it would, without the passage of the act, have passed to the commonwealth. The intention of the legislature to do so seems obvious from the imperative language, "shall descend and pass," used in the act; and is most clearly evinced by the saving of all rights, etc., to all other persons except the person attainted or convicted. The exception as to the offender in the saving, proves that it was not intended by the legislature that he should be benefited by depriving the commonwealth of her right of forfeiture, and the saving as to the rights of all other persons, etc., proves that whilst the legislature was renouncing the claim of the commonwealth to all forfeiture, it was intended to pass that same interest to others, who, without the saving, might hold it to the prejudice of the rights of those mentioned in the saving.

But it was not intended by the act to create new forfeitures, or to increase existing penalties, against the person attainted or convicted. His condition, as respects his estate, was not to be bettered, nor was it to be rendered worse; any estate or interest in his lands and goods, which by the then existing laws he would have been entitled to retain after attainder or conviction, was not intended by the legislature to be disposed of by the act; and if any such interest or estate there be, the attainted or convicted person must, notwithstanding the provisions of the act, be understood still to retain it.

We are, therefore, led to inquire whether or not, at the passage of the act, the whole or a part only of the offender's estate was, upon his attainder or conviction of felony, forfeited to the commonwealth. The answer to this inquiry is found in the twentieth section of the tenth article of the constitution of this state. That section declares: "That no attainder shall work

corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth."

It was, therefore, not the absolute fee-simple estate of the offender in lands and goods, that according to the constitution, was forfeited to the commonwealth on attainder, or conviction of felony; but it was the interest or estate, which the offender was entitled to during his life only, that by the laws in force at the passage of the act was forfeited.

The reversionary interest, or in other words, that part of the estate which remained after the death of the offender, according to those laws, resided in him after conviction, and since the passage of the act, must, we apprehend, still be understood to continue to reside in the offender, though attainted or convicted.

It results, therefore, that, notwithstanding Rankin's conviction of the murder of Blake, he retained a reversionary interest in all the lands and personal estate owned by him at the time of conviction; so that on account of any forfeiture of his estate he can not, according to the authorities cited, be deemed incompetent to dispose of the interest not forfeited, and still possessed by him. Nor is there any thing in the nature, or character of that interest which forbids its being disposed of by will. The constitution, as well as the act of 1796, had both declared that no conviction of felony should work corruption of blood. There was, therefore, nothing either in the sentence of condemnation against Rankin, or in the nature of the interest in reversion held by him, which would have prevented that interest from descending and passing to his legal representatives, provided he had died intestate; and the rule is well settled, that whatever is descendible is also devisable by will.

It is, therefore, the opinion of a majority of the court, the chief justice dissenting, that, notwithstanding the conviction of Rankin, he was capable of making a will, and that the county court was correct in admitting it to record.

The order of that court must, consequently be affirmed with costs.

GRAHAM'S HEIRS v. GRAHAM.

[6 T. B. MONROE, 561.]

WIDOW IS ENTITLED TO DOWER IN AN EQUITABLE ESTATE of her husband, capable of being specifically enforced in his life-time.

RENTS OF THE MANSION OF THE DECEASED HUSBAND must be assigned to the widow until her dower is assigned.

RENTS MUST BE PAID ON IMPROVED LANDS OF THE TESTATOR by one of several heirs who has had the sole use thereof, the value of improvements made by him to be deducted from such rents; but in no case should a balance for improving be charged against the co-heirs.

APPEAL from the Bullitt circuit. The opinion states the case.

Denny and Mayes, for the appellants.

Crittenden, for the appellee.

By Court, MILLS, J. The heirs of Graham claimed by their bill in equity, a conveyance of a tract of land sold to their ancestor by Hornbecke. Pending this suit the heirs interpleaded with each other in equity, one of them claiming the whole land as having been purchased for him by the ancestor, and the others with the widow, contending for the whole to be divided as estate held in coparcenary. The court below ultimately decided in favor of the one who claimed the whole.

The controversy between the heirs is one purely of fact, and the claim of the whole by one heir depends on a bond said to be executed by the ancestor, which is denied to be genuine. Without going into the details of fact, suffice it to say that this supposed bond is produced by the claimant of the whole, and proved by one of the subscribing witnesses, under circumstances which totally forbid the belief that it is genuine, and the whole transaction is one which pays but a poor compliment to human nature.

The decree of the conveyance to one heir must, therefore, be reversed, and the conveyance from Hornbecke be decreed to the whole of the heirs, with costs against Hornbecke; and in the suit for a partition a decree must be rendered dividing the land according to quantity and quality of the land at the cost of that heir who has claimed the whole. In this partition some questions arise worthy of notice.

The widow, as her husband had an equity in his life-time which might have been specifically enforced, will be entitled to dower of one third of the estate, according to former adjudications, to be laid off, if practicable, in such convenient form as to bear equally on the shares of each heir. If not practicable, then to be assigned in such form as to be again divided after her decease.

The question of rents also occurs, as one heir who now claims the whole has possessed and enjoyed the farm since the decease of the ancestor. It seems that a former suit in equity was decided between the distributees and the son, Samuel Graham,

who now claims the land entire, and who was the administrator of the father. In that suit the rents of the farm were adjusted, and he was made to account for them to the date of the report and settlement made in that suit. Consequently the charge of rents must be now commenced where that account closed.

These rents must be decreed to the widow, because the farm in question was the mansion of the testator at his death, and by the statute she is entitled to the use thereof till her dower is assigned, which has never been done.

But a question results as to what land rents must be charged upon. Some of it was cleared and fitted for cultivation by the ancestor, and some has been cleared by the son, who now claims the whole; and the question is, what rents ought to be charged on this additional land.

That rents ought to be charged on the land cleared and improvements made by the ancestor, can not be doubted. But it is insisted by the son, Samuel, that he is entitled to compensation for his improvements, and ought not to pay rents thereon.

We are not disposed to award to a parcener compensation for improvements and ameliorations, so as to make his coparceners his debtors. But we conceive that he ought to be charged with the rents of such new improvements, from the time they were made, and that this rent may be lessened by the price of improving, so as to sink those rents, if sufficient; if not sufficient then the balance of rents ought to be charged against the improver. But in no event ought a balance for improving to be charged against the co-heirs.

The decree must be reversed, with costs, and the cause be remanded for a decree in conformity with this opinion and the rules and usages of equity.

Held in *Swaine v. Perine*, 9 Am. Dec. 318, and in *Hitchcock v. Harrington*, 5 Id. 229, that a widow has a right to dower in an equity of redemption. For a discussion of this question see note to the latter case.

MORFORD v. MASTIN.

[6 T. B. MONROE, 609.]

FAILURE TO COMPLY WITH TERMS OF A SPECIAL COVENANT destroys the right to recover under the contract.

WAIVER OF OBJECTIONS TO QUALITY OF WORK DONE.—Where the contract is for work to be done on movable articles, acceptance is a waiver of objection to the quality of the work; but where the article made immediately becomes a part of the realty, the use of it does not amount to an acceptance.

PLAINTIFF CAN NOT RECOVER A QUANTUM MERUIT in an action of covenant, after having failed to prove the performance of a condition precedent.

DEMAND IS NOT NECESSARY where the person owing the debt or duty, has means of knowing when it becomes due as well as the opposite party.

COVENANT. Appeal from the Bracken circuit. The opinion states the case.

Brown, for the appellant.

Crittenden, for the appellee.

By Court, **MILLS, J.** The appellees, **Elijah Mastin** and **William Ambrose**, entered into an article of agreement with **Morford**, the appellant, in which they stipulated "to build for said Morford, on his premises, one frame house of the following order and dimensions, to wit, thirty-eight feet in length by twenty in width; one story twelve feet high; a piazza ten feet wide, the full length of the building; four windows and three doors, two of which to contain six panels each; one flight of stairs; one partition studded, and two fire mantels; floors tongued and grooved; piazza to be bannistered and ceiled over head; a four-light window in each gable end; also, each room to be based and surbased; the said employer, Morford, to furnish all the shingles, planks, joists, nails, hinges, screws, etc.; the said undertakers to find all the balance of the materials, and to do the whole in a plain, though workmanlike manner, for the sum of one hundred dollars in specie and fifty dollars in goods, to be paid out of J. W. Morford's store. The above-mentioned four windows to contain twenty-four lights each."

On this agreement Mastin and Ambrose brought their action of covenant, and averred in their declaration that they built the house as stipulated, reciting in the averment the details of their undertaking as before set forth and alleging that although they had done all that was incumbent on them to do, and that the defendant accepted and received the said building, as thus erected, and was in the enjoyment thereof, "yet the said defendant did not pay unto the said plaintiffs the said one hundred dollars in specie and fifty dollars in goods, paid out of J. W. Morford's store, which he ought to have paid."

The defendant below pleaded: 1. Simply traversing the performance of the precedent condition on part of the plaintiff, pursuing the terms of the covenant in detail; 2. "That the plaintiffs did not furnish all the materials and do all the work in a plain, workmanlike manner, which they, the said plaintiffs,

were by the covenant to furnish and do in and about said house, and that he, the said defendant, did not receive the building in discharge of the covenant."

On these pleas issues were joined to the country; on the trial, the plaintiffs proved that they had built and finished the house as described in the covenant, and that the son of the defendant resided therein. But the plaintiff's own evidence showed that the rails of the bannisters seemed loose and defective, and that the base and surbase were not so broad as they ought to be.

The defendant introduced no evidence conducing to show that the work was not done, but that some parts of the work were not well done; that although parts of it were strong and plain, yet there was not a complete ranging of the bannisters of the porch, and the floor descended towards the house, instead of an opposite direction, so as to lead the water rather to, than from the house. To rebut this evidence, some testimony was introduced by the plaintiffs. On this evidence the counsel for the defendant below, moved the court to instruct the jury, that if they believed the work was not done by the plaintiffs in a workmanlike manner, or in the manner specified in the covenant, then the plaintiffs could not recover in this action. The court overruled this application.

The defendant then asked the court to instruct the jury, that unless they believed, from the evidence, that the defendant accepted the building in discharge of the contract declared on, the plaintiffs in this action were not entitled to recover. But the court overruled this motion, and instructed the jury, that if the defendant had received the work at all, the plaintiffs had a right to recover, subject to a deduction for a defect in the workmanship, if the defendant required it; if not, the defendant would have a right to his action for damages for such defects.

The defendant then moved the court to instruct the jury, that unless they believed from the evidence, that the plaintiffs had demanded of the defendant the fifty dollars in goods, in the covenant mentioned, they ought not to find damages for the non-payment of said fifty dollars.

This motion was also overruled, and the jury having found for the plaintiffs below, the defendant has appealed from the judgment rendered on the verdict, and the questions now presented for our consideration are those made in the instructions refused and given.

It will easily be perceived by this statement of the case, that the doctrines which govern precedent conditions in covenants

are nicely involved. For that the performance of the labor and erecting the building provided for in the covenant, was a precedent condition to the payment for it, we apprehend there can be no reasonable doubt. The plaintiffs below were, therefore, bound to aver and prove a performance thereof, or they could not recover. They did prove such performance generally, and the only failure on their part, relates to the manner in which the work was done in some parts thereof, to the greater part of which no exception could be taken. Nor can there be any doubt, as said by the court below, that the defendant could sustain his action for these defects in the workmanship. But although parties to a covenant may in general have mutual remedies, yet it is competent for one, in addition to the security afforded him by his action for a breach, to add the additional security, of detaining his performance, till he receives the performance of the other side, which forms a precedent condition, when the performance of one side constitutes the whole consideration of performance by the other, or both may reserve the consideration to be given by them, till one perceives that the other is ready, and then each perform simultaneously, in which case the covenants are mutually dependent, and each has the security of retaining till the other performs, and neither has his action till he at least tenders a performance.

The rules governing such cases are simple and easily understood, but their application to the cases presented for adjudication is often difficult. It can easily be seen that the whole matter will resolve itself into a question of intention. Did the parties intend to furnish one or both with the remedy of retaining, in addition to his remedy at law, for a breach? The manner, therefore, in which parties express themselves obscures the intention frequently, and leaves the difficulty, but the intention in this case is plain. This is certain, as a general rule, that where one has the precedent condition in his favor he is not liable to an action until the other has performed, and when an action is brought the defendant has a right to require the other to prove the performance according to the stipulation.

Here there is a general performance according to the stipulation, agreeably to its general outlines; but in the manner, or, rather, in the quality of the performance proved as to part of the work, there is a failure. Is this such a failure as totally to preclude all recovery in this action? Will the failure to complete the work in a workmanlike manner, in a small part thereof when the greater part is well done, destroy forever the

right of action on the contract and leave the other side to enjoy the labor already well done? To answer these questions in the affirmative may, at first blush, seem rigid and severe. But still, we apprehend, such an answer must be given, and the evils arising from its apparent rigor will be partially compensated by the preservation of good faith in performing special agreements. Starkie, in his Treatise on Evidence, vol. 2, p. 97, lays down the following doctrine and supports the same by citations of adjudged cases: "Where the plaintiff under a special agreement has executed the work improperly, since he has not done that which he engaged to do, and which is the consideration of the plaintiff's promise to pay, it seems to be now settled that the plaintiff must recover, if at all, upon the *quantum meruit*, and that he can not recover more than the value of the work and materials to the defendant. And where the plaintiff has executed his work so ill that the defendant has derived no benefit from it, or none which exceeds in value the sum which he has paid, the plaintiff is not entitled to recover at all, even for the labor and materials."

This is the doctrine of the law in regard to special verbal agreements, and the action of assumpsit founded thereon, and surely in covenant the law can not be less rigid; for if a performance, not in the manner agreed, can not be construed as fulfilling a verbal promise, it can not be made to fulfill a writing and a contract of higher dignity, less flexible than a verbal promise. As there was evidence in this case conducing to show that the plaintiffs had not performed in the manner stipulated by them, the court erred in refusing to give the first instruction asked by the defendant, for it certainly ought to have been given.

With regard to the second instruction asked, that is, that unless the jury believed from the evidence, that the defendant accepted the building in discharge of the contract, the plaintiff could not recover; if it had been simply overruled, we might possibly have found nothing in the act of the court to disapprove; for there was no evidence conducing to show a non-acceptance when he was in the full enjoyment. But the court proceeded to give a positive instruction, telling the jury that if the defendant had received the work at all, the plaintiff had a right to recover, subject to a deduction for the bad quality of the work, if he elected, or he might resort to his action. This was allowing the jury to mould the action into a mere *quantum meruit*, instead of enforcing a special agreement.

We are unwilling to attach so much importance to the defend-

ant's receiving the work. How could he reject it without abandoning his estate on which it was situated? It was already part of his freehold, and he received every part as it progressed. The court seems to have confounded the case of a building on an employer's premises, with such jobs of work and labor as a tailor performs in making his garment, the cabinetmaker in his furniture, or the painter his figures. In these latter cases it is admitted that much depends on the acceptance of the article made, and not objecting to it, and rescinding the contract so soon as the defect is discovered, and that for a very good reason; because it is necessary to do justice to the mechanic, by repossessing him of the article out of which to make his money, instead of keeping both the article and the price. Hence, Starkie, vol. 3, p. 1769, says: "Notwithstanding the universality of the position, that performance, when it is the consideration for the payment of the stipulated price, is a condition precedent, yet the conduct of the employer, in adopting of the contract, when if he disputed the performance, he had it in his power to rescind it *in toto*, by placing the parties *in statu quo*, affords, as against him, a conclusive presumption that the work has been properly executed, or, at all events, excludes the party acquiescing from making the objection. Instances to this effect have already been cited. The principle extends to all cases of executory contracts, for works of art to be delivered in a complete state. The party receiving the work under a specific contract, must abide by it, or rescind it *in toto*."

But it is well known that such return and such rescinding of a contract is impracticable with regard to a building erected on the employer's own premises. He could not object to the work and leave it on the hands of the workman, without conveying away his estate; nor could the mechanic receive or sell it for his own indemnification. Hence the reception, that is, leaving it on his premises, not demolished, or even living in it, could not with any good reason preclude the employer from making the objection on the trial, as the instruction given supposes. The same author which we have already quoted, says, vol. 3, p. 1769: "When such complete return and rescinding of the contract is, from the nature of the case, impracticable, as where the contract is to build a wall or a house on the premises of the employer, and the contract can not be rescinded *in toto* then, although the defendant has partially availed himself of the plaintiff's labor and materials, supplied by him, and has not rescinded the contract *in toto*, yet it seems to be now settled that if the work has

been defectively performed the plaintiff can not recover, but on a *quantum meruit* for the labor, and *quantum valebat* for the materials, to the amount of the benefit actually derived." From this authority, as well as the reason of the case, which does not compel an employer to part with his land to get clear of a defective building, erected by a workman, it is clear that the acceptance of the work does not bind the employer to waive the precedent condition and permit the undertaker to recover the precise sum. Nor can he be allowed to recover in this action a *quantum meruit* after failing to prove the precedent condition, as the court below informed the jury in the second instruction moved by the defendant, and consequently no such instruction ought to have been given. On the third point, to wit: refusing to instruct the jury that a demand of the goods was necessary before their value could be recovered, the court below did not err. Those goods, as well as the specie, became due absolutely on the day that the house was completed according to contract. Nor was it necessary that the undertakers should give the employers notice of that moment or make a request of the goods. The employer had the means of knowing this, and was bound to know it as well as the undertakers. For it is a settled rule that when a debt or duty becomes due on a particular event, if the person owing it has the means of knowing and ascertaining it as well as the opposite party, he is bound to take notice of it, and no notice and request is necessary. As, therefore, the employer here was bound to know the day on which the goods fell due it was only necessary for the plaintiff to aver that the event had taken place, and not to aver a demand before they could recover. It lay upon the defendant, if the event had transpired, to discharge himself by showing a readiness on the day to pay the goods, instead of complaining that the plaintiffs did not call upon him for that which he probably had not ready to give them.

But for refusing the first instruction, and giving the second, the judgment is erroneous, and must be reversed, with costs, and the verdict set aside, and the cause remanded for new proceedings not inconsistent with this opinion.

NO DEMAND IS NECESSARY in a covenant for delivery of property on a day certain: *Mitchell v. Gregory*, 4 Am. Dec. 655; *Rector v. Purdy*, 13 Id. 494.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

GOICOECHEA v. LOUISIANA STATE INS. CO.

[6 MARTIN, N. S. 51.]

INSURERS ARE DISCHARGED BY A BREACH OF A WARRANTY in the policy, whether such breach was or was not the cause of the condemnation and loss.

KINDS OF WARRANTIES.—Warranties in policies of insurance are of two kinds, affirmative and promissory, each being in the nature of a condition precedent, on the non-performance of which the contract becomes void.

RULE THAT WRITTEN PARTS OF A POLICY CONTROL THOSE THAT ARE PRINTED applies only where the written and printed words so contradict each other that the one must yield to the other; where they do not, the policy must be so construed as, if possible, to give effect to every part of it.

APPEAL from the court of the first district. The opinion states the case.

Grymes, for the plaintiff.

Eustis, for the defendant.

By Court, PORTER, J. This suit was instituted on a policy of insurance on goods on board the schooner Isaac McKim, from Havana, in the island of Cuba, to Soto la Marina, in the republic of Mexico. The policy contains a warranty that the insurers are to be “free from any charge, damage or loss which may arise in consequence of engaging, or having been engaged, in illicit or prohibited trade, at any time whatsoever.” The property insured is represented to be Spanish, and the premium paid is five per cent.

The schooner on approaching the port of Soto la Marina,

was taken possession of by an armed vessel belonging to the Mexican government. Proceedings were instituted against her in a court of justice, and she and her cargo were condemned. The grounds of condemnation, as stated in the opinion of the assessor, and the final decree of the court, are that the cargo belonged to the Spaniards; that it was the produce of Spain; and that the schooner sailed from an enemy's port.

Some of the causes of condemnation being *jure belli*, and others a breach of municipal law, the question has been raised, and very fully argued, whether the defendants are protected by the warranty in the policy against illicit trade.

In the case of *Cucullu v. The Present Defendants* [16 Am. Dec. 199.], which lately underwent so much discussion in this court, the judgment rendered went on the idea that if there was a breach of warranty, no matter whether that breach was or was not the cause of condemnation and loss, the assurers were discharged.

By our law, warranties in policies of insurance are of two kinds, affirmative or promissory, and they are considered in the nature of a condition precedent; that is, on the falsehood of the affirmative, or the non-performance of the executory stipulation, the contract becomes void, and is incapable of producing any obligation between the parties.

The *lex mercatoria* of the continent of Europe has adopted the same principles, with this difference perhaps, that there a substantial compliance with the warranty is sufficient, while here it must be strictly, or, according to some, literally performed. Hence it follows, that as soon as a breach of warranty is established, it is immaterial to inquire whether the loss was occasioned by it or not; for the insured having failed to comply with the condition on which the insurer agreed to bind himself, the latter is discharged from all responsibility: Condry's *Marshall*, 348, 349, 436, 452; *Park on Ins.* 422; *Philips on Ins.* 127; *Emerigon No. 1, c. 6, sec. 4, 164 a, 168*; *Pothier on Ass.*, No. 199; *Boulay Paty Cours de Droit Commercial*, vol. 3, sec. 15, 507 a, 510; *Code de Com. Franc.*, art. 348.

It is unnecessary for us, therefore, to go into an examination of the point so much discussed at the bar, whether the breach of municipal law or the violation of the rights of Mexico as a belligerent was the principal cause of condemnation. Whether the sentence shows the one or the other is immaterial, provided it shows there was a breach of the warranty. That it does, there can not be a doubt. The decree condemns the goods because they are enemy's property, and because they are about to be

introduced in violation of municipal law. The last cause of condemnation proves that the insured did not comply with his warranty, and as that is a condition precedent to his right of recovery, he can not succeed in this action: See 3 Burr. 1419.

But the plaintiff contends that however correct such a doctrine may be in an ordinary case, the rule can not apply here, because the terms of the contract do not authorize it.

The policy is in the usual form. Immediately after the clause of warranty against illicit trade, which makes a part of the printed instrument, there is written: "This insurance is declared to be on seventy-four boxes of white wax, marked S. C., valued at seven thousand dollars, represented to be Spanish property."

These expressions being written, it is argued they must control that part of the policy which is printed, and, therefore, the assurers are responsible, as by the contract they were informed the assured was about to embark on an illicit trade, and with that knowledge took the risk. The high premium paid is offered as another argument in support of this construction.

The rule invoked by this argument, that the written parts of the policy should control those that are printed, is correct, because the written words are the immediate language and terms stated by the parties themselves for the expression of their meaning, and the printed ones, a general formula made for all cases that may be presented. But the rule can not properly receive an application in cases other than those where the written and printed words so contradict each other that the one must yield to the other. Where they do not, the principle must necessarily be subordinate to another, to which the policy of insurance and all other contracts are subject in their interpretation, viz., that every part of them should have effect, if possible. This is a fundamental rule of construction, to which we do not at this moment recollect an exception, and it is founded on the plainest of reasons, namely, that it can not be supposed that terms to which a meaning can be given, and which have an important bearing on the interests of the parties, were inserted or left in the contract for no purpose: Civil Code, 270, art. 57; Pothier on Ob., No. 92; 1 Burr. 282.

The position, therefore, assumed by the plaintiff, will not bear the application of this principle. It is true, the insurers underwrote a policy which, among other risks, presented that of an illicit trade, but at the same time they declared that they would not assume the latter risk, and that he would take it on himself. Now, if we should say that the representation of the

property being Spanish, and that it was to be carried from an enemy's port to Soto la Marina, makes the insurers responsible for a breach of municipal law, then the clause that the assured would take the risk of illicit trade means nothing. If, on the contrary, we give to this warranty its full effect, and say that the insurers were not to take that risk, we do not destroy that part of the policy which declares that the property was Spanish and was to be carried from an enemy's port; because we still leave, as a subject for the contract to operate on, all other risks of the sea, and those proceeding from the war existing between Mexico and Spain. The latter interpretation is, therefore, that which the court is compelled to adopt, for by it we give effect to both clauses of the contract; by the other we would destroy one of them.

We have been referred by the counsel for the plaintiff to a case decided in the circuit court of the United States for Pennsylvania, and a *nisi prius* decision in New York, where it was held that when the insurer knows the cargo which he underwrites to be prohibited, he is not protected by the warranty that he is not to be responsible for illicit trade. No reason is given in either of these cases why, on a voyage of this kind, the underwriter may not agree to take sea or war risks, and refuse those arising from seizure for illicit trade, and we are totally at a loss to conceive on what grounds such an opinion can rest. Admitting that he is bound to know the municipal regulations of the country to which the goods are carried, he may certainly refuse to be answerable for violation of them. Nothing prevents the parties to a contract of insurance from dividing the risks; the assurer may take all or any portion, as he thinks fit. These decisions, however, are in direct opposition to that given in the case of *Hubbard v. Church*,¹ in the supreme court of the United States, and to that of *Higgins v. Pomeroy*,² in the supreme court of Massachusetts: 2 Cranch, 232; 11 Mass. 104; 1 Cond's Marshall, 346; 1 Anthon, 26.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed with costs.

1. *Church v. Hubbard*, 2 Cranch, 232.

2. *Higginson v. Pomeroy*, 11 Mass. 104.

BARRERA v. ALPUENTE.

[6 MARTIN, N. S. 69.]

LAWS DETERMINING AGE OF MAJORITY.—The laws of the domicile of origin govern the state and condition of a minor, into whatever country he removes.

APPEAL from the court of probates of the parish and city of New Orleans. The opinion states the case.

Straubridge, for the plaintiff.

Cuvillier, for the defendant.

By Court, PORTER, J. The plaintiff sued in the court below to recover her share in the succession of her grandmother; she was nonsuited on the ground of being a minor, and from that judgment she has appealed to this court.

According to the facts, as they appear on record, the plaintiff was born in the year 1802, in Louisiana, the laws of which, at that time, fixed the age of majority at twenty-five. She is now, and has been for several years, a Spanish subject, and a resident of Spain, where minority ceases at the same time of life. In the year 1808, when the plaintiff was six years old, a change was made in the law of the late territory of Orleans, and the period of majority was fixed at twenty-one.

The question therefore, is, whether under these circumstances, the plaintiff was a major at twenty-five years old, or at twenty-one. If the former, she was not of age when the suit was commenced and decided in the probate court.

The general rule is, that the laws of the domicile of origin govern the state and condition of the minor, into whatever country he removes. The laws of Louisiana, therefore, must determine at what period the plaintiff came of age; and by them, she was a major at twenty-five. Admitting that her removal into another country before the alteration in our law would exempt her from its operation, and that her state and condition were fixed by the rules prevailing in the place she was born, at the time she left it, a point by no means free from difficulty, no proof has been given that the plaintiff was taken out of Louisiana before the change made in 1808; and as the defendant, by pleading the minority, assumed the affirmative, it was her duty to establish the fact on which the exception could be sustained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and

reversed; that the exception filed by the defendant be overruled, and that the cause be remanded, to be proceeded in according to law, the appellees paying the costs of this appeal.

CONFLICT OF LAWS RELATING TO AGE OF MAJORITY.—The doctrine of the principal case is that maintained by many of the jurists of continental Europe, and approved by some English and American writers on the subject. It is also in accord with the case of *Le Breton v. Nouchet*, 5 Am. Dec. 736, in deciding which the court say: "The law of nations is the law at Natchez as well as at New Orleans; according to the principles of that law, 'personal incapacities, communicated by the laws of any particular place, accompany the person wherever he goes. Thus he who is excused the consequences of contracts for want of age in his country, can not make binding contracts in another.'" In France this principle is enacted into a positive law, for the Civil Code, art. 3, provides: "Les lois concernant l'état et la capacité des personnes régissent les François même résidant en pais étranger." "The reason given by those civilians who hold the opinion that the law of the domicile of birth ought in all cases to prevail over the law of the place of the actual domicile in fixing the age of majority, and that it remains unalterable by any change of domicile, is that each state or nation is presumed to be the best capable of judging, from the physical circumstances of climate or otherwise, when the faculties of its citizens are morally or civilly perfect for the purposes of society. And with respect to cases of lunacy, idiocy and prodigality, it is supported by them upon the general argument from inconvenience, and the great confusion and mischief which would arise from the same person being considered as capable to contract in one place, and incapable in another; so that he might change his civil character and capacity with every change of his domicile:" Story Con. of Laws, sec. 72. But however satisfactory the reasons in favor of the rule given above may be to the minds of many continental jurists who have written upon the subject, it is very evident that they have not been generally considered satisfactory in the jurisprudence of England or of the United States. In the same section from which we have just quoted, Judge Story proceeds: "There may, perhaps, be a solid ground of argument in favor of giving a universal operation in all other countries to certain classes of personal incapacities created by the law of the domicile of the party; but it will be difficult to maintain that the same reasoning does or can apply with equal force in favor of all personal incapacities; or, that the law of the domicile of birth ought to prevail over the law of the actual domicile. And even in relation to those personal incapacities which are supposed most easily to admit of a general application, it is by no means so clear that the argument from inconvenience is not equally strong on the other side." The supreme court of Louisiana, in the celebrated case of *Saul v. His Creditors*, 16 Am. Dec. 212, say: "The writers on this subject, with scarcely any exception, agree that the laws or statutes which regulate minority and majority, and those which fix the state and condition of man, are personal statutes, and follow and govern him in every country. Now, supposing the case of our law fixing the age of majority at twenty-five, and the country in which a man was born and lived previous to his coming here placing it at twenty-one, no objection could be perhaps made to the rule just stated, and it may be, and we believe would be true, that a contract made here at any time between the two periods already mentioned would bind him. But reverse the facts of this case, and suppose, as is the truth, that our law placed

the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country where he resided, and that at the age of twenty-four he came into this state and entered into contracts; would it be permitted that he should, in our courts and to the demand of our citizens, plead, as a protection against his engagements, the laws of a foreign country of which the people of Louisiana had no knowledge? and would we tell them that ignorance of foreign laws in relation to a contract made here was to prevent them enforcing it, though the agreement was binding by those of their own state? Most assuredly, we would not."

The doctrine of the decision last quoted, although fiercely assailed by some writers of eminence, has maintained its ground against all attacks, and is the settled law at least in England and in this country. Burge says the reasoning of the decision is very judicious and practical, and adds: "This doctrine promotes, whilst that to which it is opposed is inconsistent with those principles of mutual convenience which induce the recognition of foreign laws. The obstacles to commercial intercourse between subjects of foreign states would be almost insurmountable, if a party must pause to ascertain, not by the means within his reach, but by recourse to the law of the domicile of the person with whom he was dealing, whether the latter has attained the age of majority, and consequently, whether he is competent to enter into a valid and binding contract. If the country in which the contract was litigated was also that in which it had been entered into, and if the party enforcing it were the subject of that country, it would be unjust, as well as unreasonable, to invoke the law of a foreign state for the benefit of the foreigner, and to deprive its own subject of the benefit of the law of his own state." 1 Burge Com. For. and Col. Law, 132. And the same writer, at page 27, says: "In a conflict between the personal law of the domicile and the personal law of another place at variance with it, that of the domicile prevails. But the preceding rule admits of some qualification. It is not to be applied when it would enable a person to avoid a contract which he was competent to make by the personal law of the place in which he made it, although he was incompetent by the personal law of his domicile. Thus, if a person whose domicile of origin was in Spain, where he does not attain his majority until his twenty-fifth year, should, at the age of twenty-three, enter into a contract in England, or any other place where his minority ceases at twenty-one, he would not be permitted to avoid his contract, by alleging that he was a minor, and incompetent to contract, according to the law of Spain.

"The maxim that every man is bound to know the laws of a country in which he enters into a contract, is of universal application, and is perfectly just and reasonable; because it is in his power to obtain that knowledge; but the maxim, '*qui cum alio contrahit, vel est, vel debet esse non ignarus conditionis ejus*,' can not be applied in those cases, in which the condition depends on facts and law to which he is a perfect stranger." The same principle is vigorously maintained by Lord Meadowbank in *Gordon v. Pye*, Ferg. Consist. R. 361: "This category of law does not affect the contracting individuals only, but the public, and that in various ways; and the consequences would prove not a little inconvenient, embarrassing, and probably, even inextricable, if the personal capacities of individuals, as of majors or minors, * * * and the like, were to be qualified and regulated by foreign laws and customs, with which the mass of the population must be utterly unacquainted. Accordingly, the laws of this description seem nowhere to yield to those of foreign countries; and, accordingly, it is believed no nation has ever hitherto thought of

conferring powers and forms on its courts of justice adequate for enabling them to exercise over foreigners regular authority for enforcing the observance by them of the laws of their own country, when expatriated. In fact the very same principles which prescribe to nations the administration of their own criminal law, appear to require a like exclusive administration of law relative to the domestic relations. Hence, in both England and Scotland, the most regular constitution abroad of domestic slavery was held to afford no claim to domestic service in this country, though restricted for only such service, and under such domestic authority, as our laws recognized. The whole order of society would be disjointed, were the positive institutions of foreign nations, concerning the domestic relations, and the capacities of persons regarding them, admitted to operate universally, and form privileged castes, living each under separate laws, like the barbarous nations during many centuries after their settlement in the Roman empire." The rule that the law of the country where the contract arose must govern the contract, is well settled by the English decisions: *Male v. Roberts*, 3 Esp. 163; *Ruding v. Smith*, 2 Hagg. Consist. R. 371; *Ex parte Lewis*, 1 Ves. sen. 298; *Gordon v. Pye*, Ferg. Consist. R. 361. Burge, p. 103, says: "A doctrine which had the effect of making the competence of a person to contract, and the validity of his transactions with others, depend on the law of a country with which he had, perhaps, ceased to be connected from the earliest years of his infancy, was so much opposed to those considerations of mutual interest and convenience, on which alone the recognition of foreign laws takes place, that it has been rejected by the greater number of jurists. They consider that when the domicile of origin has been changed, the law of that domicile no longer prevails, but yields to that of the new domicile." And this, he claims, is the view held by Rodenburg, Hertius, Burgundus, D'Argentré, Lauterback, Pothier, and by Merlin in his later editions.

Judge Story, in his learned work on the Conflict of Laws, thus collects the rules which seem to him to be best established in the jurisprudence of England and America: 1. "The capacity, state, and condition of persons according to the law of their domicile will generally be regarded as to acts done, rights acquired, and contracts made, in the place of their domicile, touching property situated therein. If these acts, rights, and contracts have validity there, they will be held equally valid everywhere. If invalid there, they will be invalid everywhere; 2. As to acts done, and rights acquired, and contracts made in other countries, touching property therein, the law of the country where the acts are done, the rights are acquired, or the contracts are made, will generally govern in respect to the capacity, state, and condition of persons; 3. Hence we may deduce, as a corollary, that in regard to questions of minority or majority, * * * and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made or the act done. Therefore, a person who is a minor until he is of the age of twenty-five years by the law of his domicile, and incapable as such of making a valid contract there, may nevertheless, in another country, where he would be of age at twenty-one years, generally make a valid contract at that age, even a contract of marriage:" Confl. of Laws, secs. 101, 102, 103. These rules are approved by the court in *Pearl v. Hansborough*, 9 Humph. 426, and they embody the principles of the decisions of the courts of all the states: *Saul v. His Creditors*, 16 Am. Dec. 212; *Baldwin v. Gray*, 16 Id. 169; *Andrews v. His Creditors*, 11 La. 464; *Thompson v. Ketcham*, 8 Johns. 190 [5 Am. Dec.

332]; *Pickering v. Fisk*, 6 Vt. 102; *Huey's Appeal*, 1 Gra. Ca. 51; *Hiestand v. Kuss*, 8 Blackf. 345; *Polydore v. Prince*, 1 Ware, 413; 2 Kent's Com. 232, note; Schouler's Dom. Rel. 520; Whart. Confl. of Laws, sec. 115. The last named writer says: "That in Prussia * * * the general doctrine of domiciliary minority is qualified so as to fix the efflux of minority in case of foreigners, according to the law by which the litigated transaction will be best sustained:" Confl. of Laws, sec. 113. It is possible that this principle has been applied by the courts unwittingly perhaps, and that it is the key to some apparently irreconcilable decisions.

STYLES v. McNEIL'S HEIRS.

[6 MARTIN, N. S. 296.]

TRANSFER OF JUDGMENT WITHOUT NOTICE.—If the transferee of a judgment neglects to give notice of the transfer to the judgment-debtor, and the latter's property is afterwards sold by the transferror to satisfy it, the purchaser at such sale, without notice, acquires a good title thereto.

APPEAL from the court of the sixth district. The opinion states the case.

Thomas, for the plaintiff.

Boyce, for the defendants.

By Court, MARTIN, J. In April, 1820, Curtis transferred to the plaintiff a judgment against Hall, which had been duly recorded, and on the death of Hall, revived against his executors; it does not appear that notice of the transfer was ever given by the plaintiff to the executors or heirs of Hall. In 1822, Curtis, notwithstanding the transfer, took out an execution on the judgment, and had it levied on a tract of land, which had been the property of Hall, and which his widow and executrix had purchased at a sale which she had provoked in the court of probates, of the property of the estate. She obtained an injunction, the dissolution of which Curtis proved. Curtis dying soon after, his mother, as his forced heir, employed Baldwin to put the judgment into execution; a tract of land that had been the property of Hall till his death, was accordingly seized and sold, and Baldwin became the purchaser of it, who afterwards transferred it to the ancestor of the defendants.

The plaintiff has instituted his action of mortgage and has prayed that unless the defendants pay the amount of the judgment, the premises may be sold to satisfy the judgment transferred to him by Curtis. He had judgment, and the defendants appealed.

In the deed of sale from Baldwin to the defendant's an-

cestor, the latter declares himself cognizant of the manner in which the vendor purchased the premises, and takes on himself every risk about the title. So that the question is, whether Baldwin acquired a good title under the sheriff's deed. We think he did. The plaintiff, by the transfer acquired an inchoate title to the judgment which he neglected to complete by giving notice of the transfer: Civil Code, 368, art. 22. He stood silent during several years, while the transferror remained the ostensible owner of the judgment. He suffered his transferror and his heirs to continue the exercise of ownership on the judgment.

Let it be granted that Curtis' heirs are legally presumed cognizant of his acts, and consequently of the transfer, nothing shows that Baldwin had the least knowledge of it, and that he did not purchase in good faith.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the plaintiff's petition be dismissed with costs.

In *Lockwood v. Bates*, 12 Am. Dec. 121, it was decided that the equitable assignee of a judgment, for value, and without notice of existing equities in favor of the judgment-creditor, takes it subject to such equities accruing before notice of the assignment.

YOCUM v. BULLIT.

[6 MARTIN, N. S. 324.]

A FRAUDULENT SALE MUST BE SET ASIDE by a suit regularly brought for that purpose; until declared null it is binding upon third persons, and such sale can not be avoided in a suit to which the vendee is not a party.

APPEAL from the court of the sixth district. The opinion states the case.

Rost, for the plaintiff.

Morris and Thomas, for the defendants.

By Court, MARTIN, J. This is an action against a sheriff and the plaintiff on a *fi. fa.*, on which the present plaintiff complains that several slaves of his were illegally seized to satisfy a judgment against a third party, and prays that he may be quieted in his title and possession, that all future proceedings in the case may be enjoined, and past ones annulled and avoided; and that he may recover damages.

Bullit, the sheriff, pleaded he levied the execution as sheriff, according to the directions of the other defendant, the plaintiff therein.

Ball pleaded the general issue, that the slaves seized were the property of the defendant in execution, and the conveyance to the present plaintiff is fraudulent and void; that it is a donation, and is void for want of acceptance; that it was not recorded in the parish of Natchitoches. There was a verdict and judgment for the defendants and plaintiff appealed.

The record shows the slaves were conveyed by the defendant in the *fi. fa.*, by a sale under private signature, recorded in the office of the parish judge of St. Landry, where the sale was made. If the sale was fraudulent, it must be regularly set aside by a suit instituted for that purpose. It was not less a sale and binding upon third parties, until declared null in an action which the law gives: *Curia Phil. Revocatoria*, n. 2; and the possession of the vendee was a legal one, until avoided in due course of law: *St. Avid et al. v. Wiemprender's syndics*, 9 Martin, 649.

The same point was determined during the last term of the eastern district, on which we held that a conveyance alleged to be fraudulent can not be tested by the seizure of the property or estate belonging to the vendor; and an action must be brought to annul the conveyance: *Barbarin v. Saucier*¹.

The plea of the sheriff can not avail him. He was authorized to seize the property of the defendant in the execution and became a trespasser by seizing that of a third person. The instructions of the plaintiff afford him no protection. It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the defendant be enjoined from any proceedings on the seizure of said slaves, and the case be remanded to assess the plaintiff's damages.

There is a plea in a supplemental petition in which it is stated that a sale has taken place on which a twelve-months' bond was taken, the canceling of which is prayed. This, we think, can not be done. We do not see that the plaintiff has any interest in requiring it. It could not be ordered without setting the sale aside, which can not be done in a suit to which the vendee is not a party.

It is further ordered, that the defendants pay costs in this court.

The doctrine of the principal case seems to be the settled law in Louisiana, and it has been frequently decided by the supreme court of that state that a creditor can not treat the conveyance of his debtor as null and fraudulent,

and seize the property in the hands of the vendee; he must bring an action to avoid the sale: *Barbarin v. Saucier*, 5 Mart. N. S. 361; *Henry v. Hyde*, Id. 633; *Richards v. Nolan*, 3 Id. 336; *Peet v. Morgan*, 6 Id. 137; *Childress v. Allen*, 3 La. 477; *Brunet v. Duvergis*, 5 Id. 124; *Weeks v. Flower*, 9 Id. 379; *Burland v. Carrollton Bank*, 14 Id. 189; *Le Goaster v. Barthe*, 2 Rob. (La.) 388; *Drummond v. Commissioners*, 7 Id. 234; *Presas v. Lanata*, 11 Id. 288; *Collins v. Shaffer*, 20 La. Ann. 41; *Payne v. Graham*, 23 Id. 771; *Ford v. Douglas*, 5 How. (U. S.) 143; *Tufts v. Tufts*, 3 Woodb. & Min. 458.

The Louisiana doctrine, with its limitations and with the reasons for its adoption, are thus presented by Porter, J., in *Peet v. Morgan*, 6 Mart. N. S. 137: "The second point presents the question, whether the plaintiff had a right to seize these goods before he brought an action to set aside the sale. It has been determined in a variety of cases decided in this court that a creditor had not a right on an allegation of fraud to treat the alienation made by his debtor as null and void, and seize at once, and by short hand the property conveyed by him. Since that doctrine has been recognized by this tribunal, there have been, it is true, cases where the parties have chosen to put their respective rights at issue in an action brought for the seizure, and the court has not declined to pass on them when they did so. The present case, however, presents the exception on the part of the vendee, and the argument on the behalf of the creditor has called our attention particularly to the correctness of this doctrine; the extent to which it may be carried, and the limitations to which it is subject. * * * Of its correctness the court entertains no doubt. It is clearly supported by authority, and it is sanctioned by reason and utility. The principle on which it rests is, that men are presumed to act honestly, until the contrary is proved; that the conveyances alleged to be fraudulent are *prima facie* correct and fair; and that it is improper in opposition to these presumptions, the creditor should exercise rights that could only properly belong to him, in case the acts of his debtor were null and of no effect. In many instances, should a contrary doctrine prevail, sales which were alleged fraudulent, might turn out to be *bona fide*, and the purchaser be deprived of the use and enjoyment of property which was honestly his. In the uncertainty which must prevail until the matter undergoes a judicial investigation, it is certainly the wisest course, and the one most conducive to general utility, to consider the thing sold as belonging to him in whom the title is vested.

"But in the application of these principles, it will be readily perceived, that though it properly governs all cases where the conveyance is by public and authentic act, its utility is not so manifest when the alienation is by a private instrument. The former is presumed known to the creditor. Its date is established, and he acts in direct violation of the presumptions which these facts create, when he treats it as a nullity, and proceeds to seize the property conveyed by it. In the latter the sale is unknown to him, the conveyance is of no certain date, and no notice is given that a transfer has been made of the property. If the date of the conveyance is subsequent to the seizure by the creditor, it is a self-evident proposition that it can not be objected to his right of seizing, that he did not bring an action to set aside the sale. If the rules of law recognize, as they do, no date to an act, *sous seign privé*, but that of the day on which it is opposed to a third party in court, then the proposition is equally evident, that it is not a good defense to make to the seizure, that suit was not brought to avoid the alienation. In both instances the answer is conclusive, that the creditor could not, by an action previous to the levy made under the execution, set aside acts which were not made until after

the levy took place; but if to this rule of law in relation to the date of acts *sous seign privé*, the party claiming the goods answers, as he may, that he can prove by circumstances *dehors* the act that it was really made at the time it purports to be executed, it is necessarily open to the creditor to rebut that proof by other testimony which will establish that it was not. That evidence the plaintiff was under the necessity of producing here, and in refusing the defendant the right to show that the sale was simulated, that is, made at a date different from that which it purported, we are of opinion the court erred."

The doctrine of these cases is derived from the civil law, and although well established in Louisiana, has never gained any recognition in any of the other states of this Union, nor in England. In fact it is directly contrary to the whole current of English and American authority on this subject. "For a transfer made to hinder, delay, or defraud creditors, while, as between the parties, it conveys the title, has, as against a creditor proceeding under execution, no such effect. As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity—not the right to control the legal title; and to have the fraudulent transfer vacated by some appropriate proceeding, it is the legal title itself, against which the fraudulent transfer is no transfer at all:" Freeman on Executions, sec. 136; *Hall v. Sands*, 52 Me. 355; *Pratt v. Wheeler*, 6 Gray, 520; *Austin v. Bell*, 20 Johns. 442; *Lowry v. Orr*, 1 Gilm. 70; *Jacoby's Appeal*, 67 Pa. St. 434; *Eastman v. Schettler*, 13 Wis. 324; *Russell v. Dyer*, 33 N. H. 186; *Middleton v. Sinclair*, 5 Cranch, C. C. 409; *Laurence v. Lippencott*, 1 Halst. 473; *Croft v. Arthur*, 3 Desau. 223; *Allen v. Berry*, 50 Mo. 90; *Ryland v. Callison*, 54 Id. 513; *Fowler v. Trebein*, 16 Ohio St. 493; *Staples v. Bradley*, 23 Conn. 167; *Manhattan Co. v. Evertson*, 6 Paige, 457; *Foley v. Ritter*, 34 Md. 646; *Shur v. Statler*, 1 West. L. Mo. 317; *Gormerly v. Chapman*, 51 Ga. 421; *Hoffman's Appeal*, 44 Pa. St. 95; *Duval v. Waters*, 1 Bland. 569; *Twyne's case*, 3 Coke, 80; *Gooch's case*, 5 Id. 60; *Shears v. Rogers*, 3 Barn. & Ald. 362; *Shattock v. Carden*, 6 Exch. 727; *Inray v. Magnay*, 11 Mees. & Wels. 267. In the case last cited the court say: "And it is now of frequent occurrence, that the sheriff is bound to take goods which have been fraudulently conveyed or assigned to defeat creditors, and is responsible in an action for a false return at the suit of a creditor."

And creditors, pursuing the remedies which the law gives them for the collection of their debts, may treat the property as though the transfer had not been made, that is, as the property of the debtor: Freeman on Executions, sec. 136; Bump on Fraudulent Conveyances, 453; *Brown v. Snell*, 46 Me. 490; *Russell v. Winne*, 37 N. Y. 591; *Booth v. Bunce*, 33 Id. 139; *Angier v. Ash*, 26 N. H. 99; *Smith v. Lowell*, 6 Id. 67.

STACKPOLE v. HENNEN.

[6 MARTIN, N. S. 481.]

LIABILITY OF COUNSEL FOR WORDS SPOKEN AT TRIAL.—Counsel are protected from liability for anything they say which is pertinent to the cause, if they are instructed by their clients to say it; but they are liable for anything spoken not pertinent to the cause, whether instructed or not.

WORDS SPOKEN BY COUNSEL WHEN THE CLIENT IS PRESENT, are presumed to be authorized by him.

APPEAL from the court of the parish and city of New Orleans. The opinion states the case.

Livermore, for the plaintiff.

Mazereau, for the defendant.

By Court, Porter J. This cause has called for great attention and reflection on the part of the court, not from the magnitude of the matter in dispute in a pecuniary point of view, nor from its importance to either of the parties, but from the great interest the public and the profession of the law have in a correct decision of the legal principles it involves.

It is an action brought against the defendant, for having, on the trial of a cause where he was of counsel, charged the plaintiff, who was examined as a witness, with being guilty of perjury, and of having come there with an intention of perjuring himself. The petition alleges the words to have been spoken falsely and maliciously, and with the intention of injuring the plaintiff.

The answer, after a general denial, avers, that the words were used in reply to observations or questions put to the defendant by the judge of the court while the defendant was acting as attorney and counsel; that in this capacity he was authorized to speak them, believing, as he then did, the case might justify the words spoken, and that they were necessary in the defense; that he was not actuated by any malice against the plaintiff.

The cause was submitted to a jury in the court of the first instance, who found a verdict in favor of the plaintiff, and assessed his damages at five hundred dollars. No motion was made for a new trial, and the court having rendered judgment conformable to the finding of the jury, the defendant appealed.

The effect which should be given to this verdict in the appellate court has been much controverted in the argument. This tribunal, it is true, is not like those courts of error at common law, where questions of fact can not be examined, and finally decided on. By the law organizing the supreme court of this state, the power is conferred on it to inquire into the correctness of the judgment below, both as it relates to law and facts, and to reverse and confirm it as the case may be. The conferring this power, as counsel correctly argued, supposed on the part of those by whom it was granted, that it would be exercised, and we have certainly no more authority for declin-

ing to reverse a judgment where there is error in fact, than we would have where the mistake proceeds from an improper application of the law. But in the exercise of this power, it has been a matter of great solicitude with the members of this court so to use it as to carry into effect the object the legislature had in view when they conferred it. In their deliberations on this matter, they have been deeply impressed with the conviction that, with a few exceptions, arising out of party violence, or prejudice, the facts of a cause are in general better tried, and more correctly understood, the nearer the investigation is carried on to the parties; and that at each remove from this vicinage, what is gained in the ascent to a higher tribunal, in its superior knowledge and freedom from extraneous influence, is more than counterbalanced in the intimate knowledge possessed by the lower court, and above all by the jury, of the character and conduct of the parties and witnesses. Hence, a rule has been established in this tribunal, and acted on for some years, not to refuse reversing a judgment where there is error in fact, but never to reverse it, unless the error is so manifest that the verdict can not be accounted for by any of these presumptions of greater advantages in the investigation to which we have just attended. This doctrine has received a more frequent application to cases where the truth depended on the weight to be attached to conflicting testimony, where fraud was at issue, or damages were to be assessed, than any others, because we have felt that the species of knowledge which juries possess is peculiarly adapted to aid the reaching a correct conclusion in causes of this description; and that every difference of opinion on our part would not authorize a reversal when that difference perhaps proceeded from wanting the advantages in the investigation that the lower tribunal enjoyed.

But even in cases such as those stated, if matters of law are presented on the record which, notwithstanding the evidence, show the judgment to be erroneous, the verdict of the jury presents no obstacle to the reversal. The influence given to the finding, necessarily yields to the superior control, which the law exercises over the case, when the conclusion drawn from the facts is contrary to that which the law sanctions.

With this explanation of the power we possess, and the principles which govern us in the exercise of it, we proceed to state, that it appears, from the evidence given on the trial below, that the defendant on cross-examining the plaintiff who was a witness in the case of *Millar v. Morgan*, was asked by the judge, what

object he had in view in putting certain questions. His answer was: "I wish to show the witness is perjured, and that he came here to perjure himself." There is some contradiction in the testimony as to the answer of the plaintiff which elicited these remarks from the defendant. But taking it in the most favorable point of view for the latter, we think the observation was rash and unnecessarily severe. The error of the witness was evidently unintentional, and a question by way of explanation would have enabled him to correct the mistake. It is now admitted on the record, that the plaintiff is a man of truth and fair character. It also appears the plaintiff was an entire stranger to the defendant at the time the words were spoken.

The question of law is one of considerable difficulty, and our jurisprudence and laws are by no means so full and explicit on the subject as could be desired. In Rome, while a generous freedom was inculcated on counsel in advocating the causes of their clients, the prohibition was express against profiting by this liberty, to speak untruths and utter slander. Spain, in her written laws, has repeated nearly *verbatim* the restraints imposed by the imperial code. But we find nothing in either the one or the other system which enables us to ascertain the extent to which counsel might carry their observations; what were the presumptions attached to their acts, or how far they were protected by them when called to answer for an alleged violation of the rights of others. The prohibition, however, contained in these codes, establishes very clearly the existence of certain limits which could not be passed; a prohibition which we may remark must be supposed to exist in every civilized, and more particularly in every free country, independent of positive authority. The proposition, that any class of men, under the pretense of aiding in the administration of justice, could say what they pleased of every individual who was a witness or a party, without incurring responsibility, is too revolting to require refutation. Equally unfounded do we consider a ground assumed in the defense of the present case, that counsel is not responsible even for speaking maliciously, if the matter was spoken during the trial, and relative to the cause in hand.

It can never be a correct discharge of duty to clients to act maliciously to others. The privileges which counsel enjoy are given for the benefit of society, and not to enable them to indulge angry passions with impunity.

It is difficult to draw the line in such a manner as that on one side will be found the rights of parties to have everything

pertinent in defense of their cause told, motives arraigned, conduct scrutinized, and that freedom of discussion which is so necessary to the discovery of truth; and on the other side, that protection from calumny and unfounded invective which honest men have a right to expect while standing before a court of justice as witnesses or parties. The best rule is, we think, to protect counsel for everything they say which is pertinent to the cause, if they are instructed by their clients to say it, and to hold them responsible for everything that is impertinent to the case, whether they are instructed or not. The last part of this rule is obviously just. The great latitude which the law allows in discussion has for its object the discovery of truth in the matters at issue, and that object can never be promoted by invective foreign to the subject under examination. The first part of the rule, we think, equally sustainable on principles of utility. The protection accorded by it does not place suitors and witnesses at the mercy of their adversaries and counsel. It only fixes the responsibility on the client instead of the advocate. Counsel are bound to believe the information communicated to them by those whose interests they advocate. Parties have a right to present their case through their agents to the tribunal that tries it in such manner as to them may seem meet; and it would be a great impediment to the free and efficient administration of justice if the attorney was obliged to make every statement the cause might require on his own responsibility. It is no doubt desirable that investigations in courts should be conducted with all the circumspection and delicacy which characterize the intercourse of social life. But this in too many instances would be inconsistent with the rigorous obligations imposed on those who administer justice. A great deal of litigation is produced by the knavery of men, hence the necessity of free and bold examination; vice frequently requires to be stripped of the mantle in which hypocrisy and cunning envelop it, and laid open to the animadversion of justice and the indignation of mankind. But these important objects could not be accomplished if the ministers whom the law authorizes parties to employ were not protected in the discharge of their duty. In England the privileges of counsel extend as far as the rule just recognized will permit them to go in this country. In France the same limits are assigned, with this sole difference, that there, by positive legislation of a very recent date, the instructions must be in writing: 3 Bl. Com. 29; 1 Mart. Rep. de Jures, 464.

The jury in the case before us have found a verdict against

the defendant, and it must be enforced unless the law which governs the case shows their finding to have been contrary to the conclusions which it authorizes on the evidence adduced on the trial.

The defendant contends it does, because the words spoken by him were pertinent to the cause in hand; and being so, must, in the absence of proof to the contrary, be presumed to have been spoken under instructions from his client.

On the first branch of this subject, it has been contended by the counsel for the plaintiff, that the finding of the jury has established the words spoken were not pertinent to the case, and that the court is concluded by the verdict. To this position we can by no means assent. The relevancy of observations made in the progress of a cause is a matter of law, not of fact. The words spoken were in answer to a question by the judge. They were pertinent, therefore, as to time; so they were as to matter, for it can never be impertinent to show that one of the witnesses brought in to establish the adversary's case is perjured.

On the second branch, the defendant has relied on the presumption that counselors at law, acting as the agents of others, must be supposed to follow the instructions they have received; and he has quoted a case of ancient date from the English books, where it was decided that if an advocate should speak slanderous words, it would be intended he spoke according to his instructions: 6 Bac. Abr. 225; Styles, 462.

It is somewhat difficult to say whether such be still the rule in that country. The elementary writers are silent respecting it, and the late decision on this subject by the court of king's bench does not directly decide the point, though the reasoning of some of the judges would induce us to presume they thought the doctrine correct, for they seemed to think it necessary express malice should be shown: 3 Bl. Com. 29; Starkie on Slander, 207; 1 Barn. & Ald. 232.

However the rule may be in cases where the client is not present, when the words complained of are spoken, we think such is the presumption of our law, when, as in the present instance, he attended on the trial of the case, was present when the slanderous words were uttered, and did not disavow them. Nay, more, that under such circumstances, the client is responsible, whether the injury inflicted was the result of such previous instruction or not. This principle can be traced to the fountain head of our jurisprudence, and its correctness is recog-

nized by one of the most modern and eminent writers of a country whose laws have the same source as our own. There is a formal text of the Roman code which declares that the allegations made by lawyers, in the presence of those they are acting for, are considered as if made by the parties themselves. The eighth law of the sixth title of the third Partidas is still more positive, and states: "Ca toda cosa que el abogado dixere in juicio, estando delante aquel a quien pertenece el pleyto, si lo non contradixisse, entendiola tanto vale, è asi deve ser cabida como si la dizesse pour su boca misma el senior del pleyto." Merlin, in his *Repertoire de Jurisprudence*, in treating of the responsibility of counsel for slanderous words, observes: "Lorsqu'un avocat sort de lui meme des bornes que lui sont prescrites, il peut etre desavoue; mais il faut que ce desaveu se forme verbalement sur le champ par la partie, ou par la procureur qui sont censes presens a l'audience sans quoi il est presume n'avoir rien avance que de leur aveu: 1 Merlin's Rep. de Juris. 464; Code Liv. 2, tit. 10, l., 1 and 3.

With these laws and principles controlling and guiding us, we can not refuse to the defendant the benefit of the presumption he invokes. We think it clearly results from them, in the first place, that the advocate is presumed to have spoken after the instructions of his client, because his client, by his silence, gives his assent to what has been said; and, second, that the latter is responsible whether he has so instructed him or not, because he makes the injury his own by ratifying what his agent does. Nor can we dismiss the case without stating at the same time our entire approbation of the wisdom and utility of such a rule. Where express notice is not shown on the part of the attorney, it can hardly be supposed he is actuated by motives other than those of advancing the interests of his clients. If the latter, who is to be benefited by these observations, stands by and acquiesces in them, and is willing to take all the advantages which the zeal and warmth of his advocate, whether justifiable or not, can bestow, it is but strict justice he should be equally responsible for the injury: *Qui sentit commodum, debet sentire et onus*.

It is, therefore, ordered, adjudged and decreed that the judgment of the parish court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that there be judgment against the plaintiff, as in case of nonsuit, with costs in both cases.

WHEN COUNSEL LIABLE FOR WORDS SPOKEN AT TRIAL.—Both in England and in this country counsel are accorded the right to speak with the most unrestrained freedom upon all subjects connected with the case which they are discussing, so long as they confine themselves to matters pertinent and material to the subject on trial. At a very early date in England, the rule on this subject was thus stated by the court: "A counselor in law retained hath a privilege to enforce anything which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false, but it is at the peril of him who informs it; for a counselor is at his peril to give in evidence that which his client informs him, being pertinent to the matter in question. * * But matter not pertinent to the issue or the matter in question he need not to deliver; for he is to discern in his discretion what he is to deliver, and what not, and although it be false, he is excusable, being pertinent to the matter; but if he give in evidence anything not material to the issue which is scandalous, he ought to aver it to be true, otherwise he is punishable, for it shall be intended as spoken maliciously and without cause, which is a good ground for an action. So if a counsellor object matter against a witness which is scandalous, if there be cause to discredit his testimony, and it be pertinent to the matter in question, it is justifiable what he delivers by information, although it be false:" *Brook v. Montague*, Cro. Jac. 90; *Hodgson v. Scarlett*, 1 Barn. & Ald. 232; *Mackay v. Ford*, 5 Hurl. & Norm. 792; *McMillan v. Birch*, 1 Binn. 178. Judge Cooley, in discussing the liability of counsel for words spoken in argument, says: "The law justly and necessarily, in view of the importance of the privilege, allows very great liberty in these cases, and surrounds them with a protection that is always a complete shield, except where the privilege of counsel has been plainly and palpably abused:" Cooley's Con. Lim. 443; Weeks on Attorneys, sec. 110; Proffatt on Jury Trial, sec. 248; Townsend on Slander and Libel, sec. 225; 14 Albany Law Jour. 433. The whole subject is thus forcibly and clearly presented by Shaw, C. J., in *Hoar v. Wood*, 3 Metc. (Mass.) 193: "Then we take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry.

The question, therefore, in such cases, is not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry. And in determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court; and a much larger allowance made for the ardent and excited feelings with which a party, or counsel, who naturally and almost necessarily identifies himself with his client, may become animated, by constantly regarding one side only of an interesting and animated controversy, in which the dearest rights of such party may become involved. And if these feelings sometimes manifest themselves in strong invectives or exaggerated expressions, beyond what the occasion would strictly justify, it is to be recollected that this is said to a judge who hears both sides, in whose mind the exaggerated statement may be at once controlled, and met by evidence and arguments of a contrary tendency from the other party, and who, from the impartiality of his position, will naturally give to an exaggerated assertion, not warranted by the occasion, no more weight than it deserves. Still this privilege must be re-

strained by some limit; and we consider that limit to be this, that a party or counsel shall not avail himself of his situation, to gratify private malice by uttering slanderous expressions, either against a party, witness, or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is on the whole for the public interest, and best calculated to subserve the purpose of justice, to allow counsel freedom of speech in conducting the causes and advocating and sustaining the rights of their constituents; and this freedom of discussion ought not to be impaired by numerous, and refined distinctions:" *Hastings v. Lusk*, 22 Wend. 410; *Mower v. Watson*, 11 Vt. 536; *Gilbert v. The People*, 1 Denio, 41; *Jennings v. Paine*, 4 Wis. 358; *Marsh v. Ellsworth*, 50 N. Y. 309; *Newfield v. Copperman*, 15 Abb. Pr. N. S. 360; *Commonwealth v. Culver*, 1 Pa. Law Jour. R. 361; *Lester v. Thurmond*, 51 Ga. 118; *Ring v. Wheeler*, 7 Cow. 725; *Shelfer v. Gooding*, 2 Jones' Law (N. C.), 175; *Needham v. Dowling*, 15 Law Jour. R. (C. P.) 9; *Flint v. Pike*, 4 Barn. & Cress. 481. But although counsel are thus highly privileged while engaged in pleading the case of their clients, yet, "if they wantonly depart from the evidence and point in issue, with an intent to injure the character of the adversary, without propriety or probable ground, they are responsible:" *Tilghman, C. J.*, in *Gray v. Pentland*, 2 Serg. & R. 23; *Commonwealth v. Culver*, 1 Pa. Law Jour. R. 361; *Gilbert v. The People*, 1 Denio, 41.

TREMOULET v. CENAS' HEIRS.

[6 MARTIN, N. S. 541.]

STATUTE OF LIMITATIONS.—Money payable immediately is not embraced within the scope of a statute which provides that money payable by the year, or at shorter periods, shall be prescribed by the lapse of five years.

SHERIFF CAN NOT PLEAD THE STATUTE OF LIMITATIONS, as to money received on an execution, which he is bound to pay immediately.

PRESUMPTION OF PAYMENT DOES NOT ARISE from the failure of the claimant to include the debt in the schedule filed by him on a cession of his goods when he was ignorant of his rights at the time the schedule was made.

APPEAL from the court of probates of the parish and city of New Orleans. The opinion states the case.

De Armas, for the plaintiff.

Christy, for the defendants.

By Court, MARTIN, J. The plaintiff claims from the heirs of the late sheriff a sum of money, which came to that officer's hands on an execution which the present plaintiff had put into his hands. The pleas were prescription and payment.

There was judgment for the plaintiff, and the defendant appealed.

The case is perfectly similar to that of *Delasize against the present defendants*, determined in this court at June term, 1826, vol. 4, 508.

To support the plea of prescription, the old Civil Code, 481, art. 78, is relied on. By this article, the arrears of all sums of money payable by the year, or at shorter periods, are prescribed by the lapse of five years. The counsel urges that as the sheriff was bound to pay the money claimed immediately, the money was payable at a shorter period than one year, *ergo*, the prescription attaches. It is clear that this article of the code applies only to sums payable by annual, semi-annual, quarterly, monthly, or daily rates; otherwise it would apply to every debt at maturity.

The plea of payment is based on a presumption arising from two circumstances: the first is that the money was received by the sheriff in 1809, and no claim appears to have been made till 1826; the second is, that in the meanwhile the plaintiff offered a cession of his goods, and in the schedule annexed to the petition no mention is made of the present claim.

To this it is urged that a plaintiff is not warned by the plea of payment of the necessity of establishing a demand anterior to the petition, and that the plaintiff was ignorant of his right against the present defendants, believing that their ancestors were discharged by the payment made under an *ex parte* order, and did not discover his error till after the decision of this court in *Delasize's case*.

We are of opinion that both pleas were correctly determined in favor of the plaintiff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be affirmed, with costs.

PERCY v. MILLAUDON.

[6 MARTIN, N. S. 616.]

JOINT OWNERS OF PROPERTY MUST BEAR THEIR RATABLE PROPORTION OF THE EXPENSES incurred by one of their number, as manager, in making useful improvements on it, when no objections were made by them to the making of the expenditures.

APPEAL from the court of the first district. The opinion states the case.

Denis, for the plaintiff.

Seghers and Grymes, for the defendant.

By Court, PORTER, J. The plaintiff and defendant were joint owners of a sugar plantation on the Mississippi. The former

owning one fourteenth, and the latter thirteen fourteenths. The defendant has had the management and direction of the property, and has received the amount for which the crops have sold. This suit is to recover the plaintiff's proportion of the profits, and to compel the defendant to render an account of them.

The answer denies the existence of any profits, avers the expenses have exceeded the revenues, and prays judgment for the balance due to the defendant.

The court of the first instance, gave judgment in favor of the defendant for two thousand five hundred and nineteen dollars and eighty cents. The plaintiff appealed.

The greatest, if not the only difficulty in the cause, grows out of the different views which these joint owners seemed to have entertained in relation to the most beneficial manner of managing the estate of which they were proprietors. The property in the situation it was placed when the parties became owners of it, was susceptible of being worked to considerable advantage, and more revenue might have been made had the defendant employed the means in his hands with a view to immediate profit. But as it was of great extent, and susceptible of being improved, so as to bring a large portion of it into cultivation, he directed his principal attention to preparing it for more extensive cultivation hereafter. In accomplishing this object he placed a large number of negroes, belonging to himself, on the plantation, and erected valuable buildings. The plaintiff contends he is not responsible for these expenses, nor is he obliged to contribute to them; that the defendant must account for everything which might have been made had the estate been managed in regard to immediate profit.

The judge below was of opinion the plaintiff should pay his proportion of these improvements and the hire of the slaves. The correctness of this opinion has been strenuously assailed; one of the grounds on which it is attacked is correct. As both the owners had an equal right to the control and direction of the property, the law supports the party who opposes any change. But the argument drawn from this right is pushed too far, when it is contended that notwithstanding no opposition was made to the mode pursued by the defendant in managing the estate, the plaintiff shall profit by the increased value given to the land by the improvements, and yet not contribute his proportion of the expenses incurred in making them.

It is urged this principle can not be applied to the parties before the court, because, during a greater portion of the time there

was a suit pending between them, in which the plaintiff's right to the land was contested; and that until he was declared owner by a judgment of the court, he had no right to interfere with the management of the property. But this circumstance did not prevent him from making opposition; nay, the whole property might have been taken out of the defendant's hands and sequestered, until the final determination of the suit, on a suggestion he was using it in such a way as to injure the right of the plaintiff: Code of Prac. 275, 3.

The fourth number of article 2841 of the code has been relied on to show that a purchaser can not dispose of or make any change in real property belonging to the partnership, without the consent of his partners, even if that change should be advantageous to the partnership. This article does not apply to the parties now before the court, who were not partners; they were joint owners; and our code has specially provided that a community of property does not, of itself, create a partnership. But if they were partners, still, the circumstance of the improvements being made with the knowledge and without the opposition of the plaintiff, would prevent him claiming the benefit of this provision: Poth. trait. de Soc., Nos. 87 and 88; Domat, liv. 1, tit. 8, sec. 4, No. 22; Dig. liv. 10, tit. 3, law 28.

The situation of the parties before the court bears a close analogy to that of an heir in a succession, who enters into possession of the whole estate, and contests the right of his co-heir to any part of it. In case the latter finally succeeds in the suit, the former, in rendering an account, would be allowed credit for all the improvements he put on the property, though strictly speaking, he is, perhaps, a possessor in bad faith: Poth. trait. du domaine de propriete, Nos. 345, 350; Dig. Liv. 5, tit. 3, law 38, 39.

Our code seems to have sanctioned the same doctrine, at least the article in the Napoleón code, which is similar to it is so understood in France: Nap. Code, 1381; Lou. Code, 2292; 11 Toullier Droit Civil, tit. 4, no. 111.

We have examined the various items of the account, and we see nothing erroneous in the judgment of the district court in relation to them. The charge for interest, so much complained of, was rejected below.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

There being in the case an error in the calculation of the interest, it is agreed by the parties that the former judgment

of the court should be so modified that the judgment of the district court be reversed and judgment rendered in favor of the defendant for two thousand six hundred and seventy-four dollars and ten cents, with interest from the date until paid, and costs in the court below, those of appeal to be paid by the appellees.

BEALE v. DELANCY.

[6 MARTIN, N. S. 640.]

FRAUDULENT SALE.—Where a father, on the verge of bankruptcy, makes a sale of his property to his infant natural son, taking the son's notes in payment, but remaining in possession until his death, such sale will be adjudged fraudulent and void as to the heirs and creditors of the deceased; and the notes will be considered null and void as regards the drawer and his heirs.

APPEAL from the court of probates of the parish and city of New Orleans. The opinion states the case.

Grymes, for the plaintiff.

McCaleb, for the defendants.

By Court, MARTIN, J. The plaintiff, widow of Thomas Beale, opposed the tableau of distribution filed by the curator of the estate of Thomas Beale, jun., son of her late husband, in her own right, and as tutor of their minor children, claiming, as such, to be placed on the tableau for the sum of one hundred and twenty-four thousand four hundred dollars, the amount of sundry notes given by the son to the father as the price of immovable and movable property, purchased by the former from the latter, with a right of mortgage, according to the terms of the sale.

Her claim was opposed by the natural mother and beneficiary heir of Thomas Beale, jun., and by the creditors of his estate.

By consent of the defendants, the curator was discharged on giving to the plaintiff a bill of sale to the property purchased by her at the vendue of the estate of Thomas Beale, jun., on her executing her notes for the price, without indorser, but giving a mortgage, according to law, the curator depositing said notes with the register of wills, and the right of the defendant, Delancy, as mother and beneficiary heir, was recognized.

By a subsequent agreement, the claims against the estate placed by the curator on the tableau, were admitted and recognized to be due, according to their respective order and privilege. The court of probates declared the sale, for the consid-

eration of which the notes, the amount of which is claimed by the plaintiff, were given, simulated and void, and, consequently, decreed the canceling of the notes.

It decreed the moneys, titles and effects of the estate, and all the property in nature, and the proceeds of so much as may have been legally disposed of, to be sequestered and detained by the curator and register of wills, to be thereafter disposed of by the court, and respectively delivered as follows: 1. The estate of Thos. Beale, jun., to the defendant, Delancy, for liquidation and settlement; 2. The property attempted to be disposed of by the simulated sale to the plaintiff, applicable, whenever separately prayed for, to the payment of the debts of Thos. Beale.

It was further decreed that the creditors of Thos. Beale, jun., should remain before the court, *in statu quo*, as nonsuited, till other proceedings should take place for the settlement of the estates, and the creditors be respectively placed on new tableaux. From this judgment the plaintiff appealed.

We think the judge of probates did not err in considering the sale from the father to the son as simulated. This sale was made at the eve of the father's bankruptcy, to an infant natural son, for a sum upwards of one hundred thousand dollars, and consideration was received in the son's notes; the father remained in possession till his death.

The sale being set aside, it naturally follows that the proceeds of the thing sold are not to be distributed, and the opposition of the plaintiff must be rejected.

The disposition of the property which the court below has made, appears to us correct; the property of Beale, sen., is given to the plaintiff, who was common in goods with him, and is tutrix of his children; that of the son to his mother, acknowledged by all parties to be his beneficiary heir. The creditors of either must prosecute the heirs of their debtors respectively.

It is, therefore, ordered, adjudged and decreed that the judgment of the court of probates be affirmed, with costs.

RETENTION OF POSSESSION by a vendor, after an absolute sale of chattels, is *prima facie*, and, if unexplained, conclusive evidence of a secret trust: *Coburn v. Pickering*, 14 Am. Dec. 375, and note, 383. A transfer of all his property, appearing to be made without consideration, by one who is much in debt, is fraudulent: *Wade v. Colvert*, 12 Id. 652. A conveyance of all the vendor's property, especially when secretly made, will be considered fraudulent as to creditors: *Bradley v. Buford*, 2 Id. 703. A conveyance will not be vacated as fraudulent, unless there were fraud on the part of the grantor, knowledge of the fraud by the grantee, and injury to the complaining creditors: *Kenag v. Dow*, 13 Id. 342.

C A S E S
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

RIPLEY v. BERRY.

[5 GREENLEAF, 24.]

WHERE LAND IS DESCRIBED IN A DEED by reference to a plan, between which and the original survey there is a difference in the location of lines and monuments, the lines and monuments as actually located are to govern.

TRESPASS for cutting trees on plaintiff's lot, No. 4. The defendants held the adjoining lot, No. 1, and the question was whether the *locus in quo* was in lot No. 1, or in No. 4. Ripley, the plaintiff, derived title under one Lloyd by a deed dated December 1, 1818, describing the lot as containing seventy-five acres, "on a plan of sundry lots in said Denmark, made by Isaiah Ingalls in March, 1809, be the same more or less, in conformity with the plan aforesaid, and however the same may be bounded." The defendants held under a deed from Lloyd, dated December 2, 1818. The side of lot No. 4 farthest from defendants' land was bounded by a pond, marked on the plan. By applying the scale to the edge of the pond as thus laid down, and measuring off the estimated length of line towards the defendants' land, the plaintiff's lot would extend far into that claimed by the defendants. But Mr. Ingalls testified that the pond was marked on the plan by conjecture only, but that the lines and courses of the lots laid down on the plan were actually surveyed, except a part of the check lines. And they were marked and certified to have been surveyed on the original plan. Ingalls's plan did not agree with his actual survey, as was shown by comparing his plan with a plan and survey made in the case by Gen. Perley, by order of the court. But by

the original actual survey the *locus in quo* fell within the lines of No. 1 as marked by Ingalls.

WESTON, J., before whom the cause was tried, ruled that the original survey controlled all the other evidence in the case, and directed a verdict for the defendants subject to the opinion of the court.

Dana and Chase, for the plaintiff.

Greenleaf and Pike, contra.

By Court, MELLAN, C. J. The decision of this cause depends upon the construction of the deed of James Lloyd, under whom the plaintiff claims. If, by such construction, lot No. 4 contains the *locus in quo*, the verdict must be set aside; if not, then judgments must be entered on the verdict in favor of the defendants. It is a well settled principle that whatever is included within the bounds of a lot as it was actually located upon the face of the earth, is to be considered as a part of such lot; and to use the language of the court in the case of *Pike v. Dyke*, 2 Greenl. 213, "where lots have been granted designated by number according to a plan referred to which has resulted from an actual survey, the lines and corners made and fixed by that survey have been uniformly respected in this state as determining the extent and bounds of the respective lots." It is admitted that by the plan of Ingalls, referred to in Mr. Lloyd's deed, the *locus in quo* is no part of lot No. 4, but belongs to lot No. 1, and the case finds that by the original survey and location it was no part of lot No. 4. In other words, the actual survey and location, and the plan agree. It is true that by the case it appears that Perley's plan and that of Ingalls do not agree; but this recent survey and ascertained variance can not affect the question. It arises, probably, by considering the pond as having been actually surveyed and correctly laid down on the plan, and then measuring northwardly from the margin of the pond, as laid down, to ascertain the north line of lot No. 4. But this process is fallacious and must be rejected, because Ingalls testified on the trial that the pond was laid down on the plan by conjecture. It is otherwise as to the lines, for it is admitted "that the lines and courses of the lots laid down on said plan were actually surveyed, except a part of the check lines," and the line in dispute is not one of these, "and marked and certified to have been surveyed on the original plan." It was admitted in the argument that this plan had been made for the use of Mr. Lloyd, and that when he caused it to be made

he was the owner of the whole tract surveyed, of which the lots in question are a part. To this plan, with the above-named certificate upon it, he refers in his deed, and by this description and reference he and his grantee must be bound. For these reasons we are all of opinion that the instructions of the judge were correct, and therefore there must be judgment on the verdict.

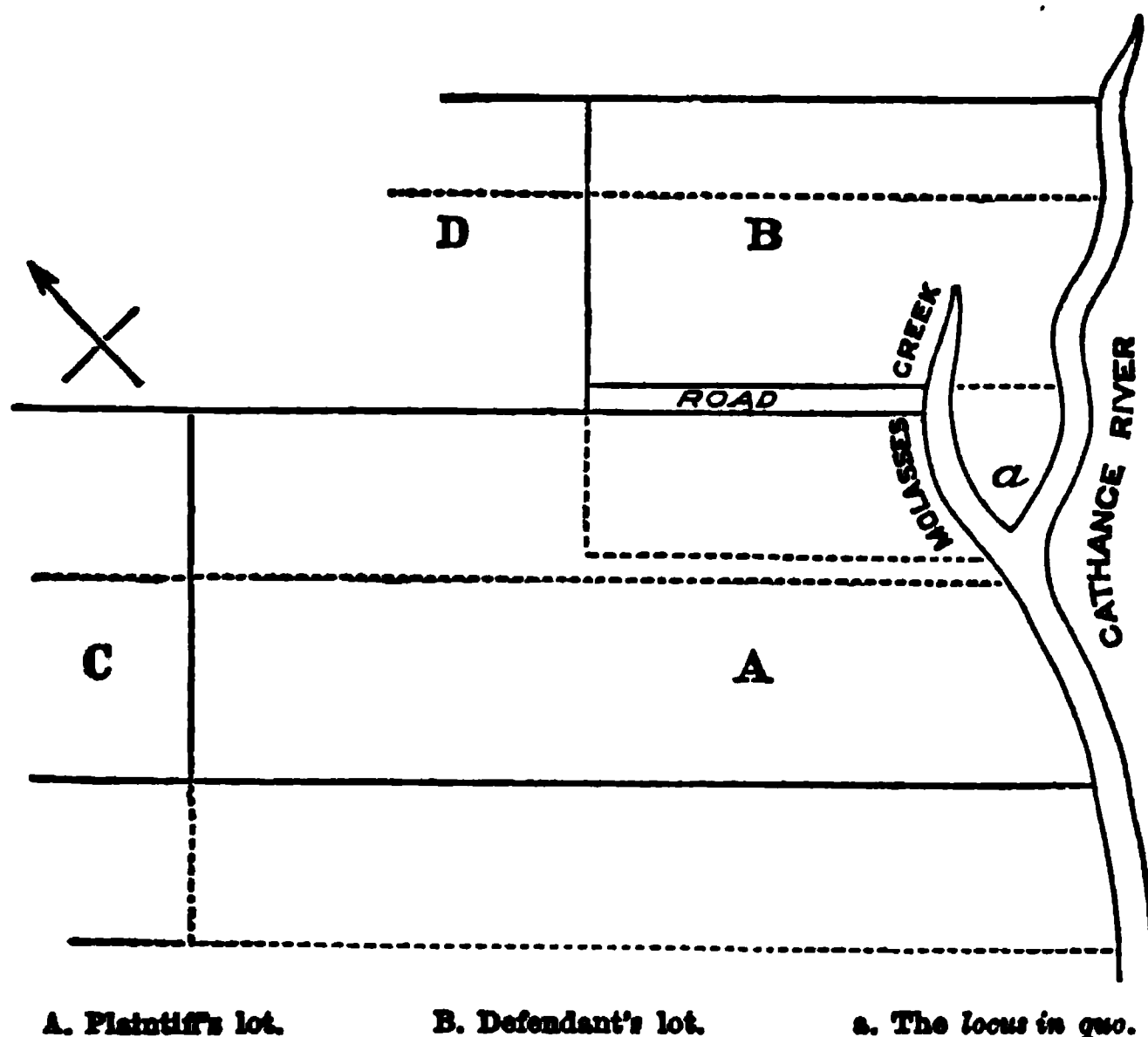
GRAVES v. FISHER.

[5 GREENLEAF, 69.]

A LOT GRANTED FRONTING on and bounded by a river will extend to the river, although the side lines thereby cross a point formed by the junction of a branch with the principal river.

AN OPINION PREVIOUSLY FORMED BY A REFEREE upon a case submitted to him is no objection to the report, if it appear that his mind was open to conviction.

TRESPASS *quare clausum*, for entry upon the plaintiff's flats, being a point of land made by the junction of Molasses creek with Cathance river. The parties, plaintiff and defendants, claimed two lots, A and B, respectively, from a common grantor,



A. Plaintiff's lot.

B. Defendant's lot.

a. The locus in quo.

James Bowdo'n, esq. In the deeds of conveyance dated in 1780 the lots were described as bounded "easterly on said river," and were said to be marked A and B, respectively.

The defendants contended that one of the side lines of plaintiff's lot A did not cross a certain branch of the river and run up to the river, but that it stopped at the branch and thereby left the flat between it and the river as a part of their lot. The matter was referred to arbitrators, and a plan of a survey made by one Merrills, in 1772, was introduced by the defendants in support of their pretensions.

The lots in point of fact, upon actual survey were situated as shown by the continued lines in the adjoining plan. The referees reported in favor of the plaintiff, that the side lines of lot A should extend to Cathance river. The defendants objected to the report, and among other grounds assigned that one of the referees had formed an opinion before the matter had been submitted. The court overruled the objections, whereupon defendants excepted.

Allen, in support of the exceptions.

Orr, *contra*.

By Court, WESTON, J. There being no question about the side lines of the lots A or B, the flats in controversy belong to the plaintiff, as the owner of A, if that lot extends to the river. The title of both the parties to their respective lots is derived from a conveyance by James Bowdoin of lot A to Abraham Preble, jun., and of lot B to Abraham Preble. By that conveyance lot A is bounded easterly on Cathance river; lot A then very clearly embraced these flats. It is contended, however, that this plain and necessary result is to be controlled and modified by a certain plan, made by John Merrill, in 1772, upon which these lots were delineated. No plan is referred to or mentioned in Bowdoin's deed; but it is urged that the designation of the lots by letters implies and supposes a plan. This does not necessarily follow. A survey might be made, and the lots now owned by the parties, and the rear lots upon which they were bounded, might receive the names of A, B, C and D, without making a plan. And if a plan was made, and A did not, as laid down upon it, go to the river; if the owner did not refer to the plan, and thought proper distinctly and expressly to extend it to the river in his conveyance, he had a perfect right so to do; and the grantee would hold accordingly. But if the plan exhibited to the referees, and now produced to the court, had been referred to, the limits of A would not thereby be curtailed. By that plan the whole easterly line of A is bounded on Cathance river. It is true,

Molasses creek is there represented as entering upon the south side of B, and extending northerly thereon; whereas, in fact, it enters upon A. But this mistake in the location of the creek does not change the rights of the parties. The creek is not given as a boundary in the deed; but each lot is expressly bounded on the river, both in the deed and on the plan. When the survey was made the waters of the river might have been so high that the mouth of the creek might appear to the eye to be on B, and this may account for its having been thus delineated; but, however occasioned, this error in the part of the plan, altogether immaterial in fixing the location of the lots, can have no legal influence in the decision of the cause.

As to the objection to one of the referees, it appeared that prior to the hearing, being acquainted with the premises, he had a strong impression in regard to the merits of the case in controversy: but he insisted that his mind was open to conviction; that he had no prejudice against the defendants, and that he was prepared to give due weight to whatever might be offered or urged in their favor. Referees are chosen and selected by the parties; and not unfrequently from the knowledge they are supposed to possess of the facts and principles which should influence their decision. If at the time of their award they should avow that the opinion they then gave was one which they had entertained prior to the hearing, and that nothing had appeared to change it, although their minds were open to conviction, and no imputation of unfairness could otherwise rest upon them, the court might, in the exercise of their discretion, accept their report. In this case it is apparent, from facts which are undisputed, that the decision of the referees was in accordance with law, and that they could not, without violating law, have decided otherwise.

The exceptions are overruled, and the judgment of the court below affirmed.

Cited in *Heckers v. Fowler*, 2 Wall. 131, in support of the following proposition: "Practice of referring pending actions under a rule of court, by consent of parties, was well known at common law, and the report of the referees appointed, when regularly made to the court, pursuant to the rule of reference, and duly accepted, is now universally regarded in the state courts as the proper foundation of judgment."

DEARBORN v. PARKS.

[5 GREENLEAF, 81.]

STATUTE OF FRAUDS.—A promise to answer for the debt of another, founded on a consideration, moving between the newly contracting parties, is not within the statute of frauds, and need not be in writing.

PROPER PARTIES, WHO ARE.—If one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it.

ACTION for money had and received. Pleas, general issue and statute of limitations. Heald purchased of the Monmouth Academy in December, 1813, a tract of land for which he gave his four notes, payable in four successive years, interest payable annually. A few months later Heald sold the land to defendant, and the latter retained as much of the purchase-money as would pay the notes remaining unpaid, and promised Heald that he would pay the same. This promise he repeated to Heald as late as September, 1815. This action was commenced in October, 1823, by plaintiff, as treasurer of the academy. Verdict was taken for plaintiff for the amount of the notes, and simple interest, subject to the opinion of the court.

Bortelle, for defendant. 1. There was no privity of contract between the parties to the action; 2. Plaintiff's cause of action was barred by the statute of limitations: *Miller v. Adams*, 16 Mass. 456; *Bishop v. Little*, 3 Greenl. 405; 3. That the promise of defendant was to pay the debt of another, and must be in writing: *Leonard v. Vredenburg*, 8 Johns. 29 [5 Am. Dec. 317]; *Skelton v. Brewster*, 8 Johns. 376.

Sprague, contra. The point of privity in cases like the present is well settled: *Arnold v. Lyman*, 17 Mass. 400 [9 Am. Dec. 154]; *Hall v. Marston*, Id. 579; *Freeman v. Otis*, 9 Mass. 276 [6 Am. Dec. 66]. It was not necessary that defendant should actually receive money in his hands; it is enough that he receive anything of value, for which he undertook to pay money: *Randall v. Rich*, 11 Mass. 494; *Longchamp v. Kenney*, 1 Doug. 137. Defendant's promise was to pay his own debt, not another's. By receiving the land, he became debtor to pay the consideration, partly to his grantor, partly to the plaintiff, by his express stipulation: *Leonard v. Vredenburg*, 8 Johns. 38 [5 Am. Dec. 317]; *Skelton v. Brewster*, Id. 376; *Packard v. Richardson*, 17 Mass. 140 [9 Am. Dec. 123]; *Gold v. Phillips*, 10 Johns. 412; *Myers v. Morse*, 15 Id. 426; *Coll v. Root*, 17 Mass. 236.

By Court, WESTON, J. In *Leonard v. Vredenburg* [5 Am. Dec. 317], cited in the argument, Kent, C. J., distinguishes three classes of cases in which one person undertakes to pay for another: 1. Where the principal and collateral promises are made at the same time, and are founded upon the same consideration; 2. Where the collateral promise is subsequently made, in which case some further consideration must be shown; 3. Cases in which the promise to pay the debt of another arises from some new and original consideration of benefit or harm, moving between the newly contracting parties. The last class he holds not to be within the statute of frauds. And Serg. Williams, 1 Saund. 211, note 2, lays down the law to be, that where the promise is founded upon some new consideration, sufficient in law to support it, and is not merely for the debt of another, although, in effect, the undertaking be to answer for another person, it is considered as an original promise, and not within the statute. *Reed v. Nash*, 1 Wils. 305, and *Williams v. Leper*, 3 Burr. 1886, are authorities to the same point. This principle, also, was fully recognized in *Coll v. Root*, 17 Mass. 236, cited in the argument.

But it is urged that admitting the correctness of the doctrine stated, the promisee should be privy to the new consideration, and that in this case he is a stranger to it. Comyn, Dig. Assumpsit, E., states that upon a promise to B. to pay twenty pounds to an infant at his full age, and to educate him in the mean time, the infant shall have the action. And that if the money be given to A. to deliver to B., B. may have the action. Rolle's Abridgement is cited by him as an authority. In *Dutton v. Pool*, the father of the plaintiff's wife being seised of a wood, which he intended to sell to raise fortunes for younger children, the defendant, being his heir, in consideration that he would forbear to sell it, promised to pay his daughter, the plaintiff's wife, one thousand pounds, for which the action was brought; and it was held that the plaintiff might well maintain it. This decision was affirmed in the exchequer chamber. In *Martyn v. Hinde*, Cowp. 437, the plaintiff declared against the defendant, rector of A., upon an instrument in writing, whereby the defendant promised the plaintiff to retain him as curate, until, etc., and to allow him fifty pounds per annum. The instrument produced in evidence was a certificate addressed to the bishop, whereby the defendant nominated the plaintiff his curate, and promised to allow him fifty pounds per annum, until otherwise provided. Upon this evidence, after argument,

the plaintiff was held entitled to recover against the defendant. And in *Marchington v. Vernon*, 1 Bos. & P. 101, note b, Buller, J., says: "If one person makes a promise to another for the benefit of a third, the third may maintain an action upon it."

The same doctrine has been expressly adopted in New York: *Schermerhorn v. Vanderheyden*, 1 Johns. 139 [3 Am. Dec. 304]; *Gold v. Phillips*, 10 Johns. 412, cited in the argument. In *Arnold v. Lyman*, 17 Mass. 400 [9 Am. Dec. 104], cited by the counsel for the plaintiff, a promise to A. for the benefit of B., was holden to inure to B., who sustained an action thereupon in his own name. And in *Hall v. Marston*, also cited from the same volume, a party receiving money from the original debtor, with directions to pay it to his creditor, was holden liable to such creditor, although he made no express promise to any one to pay him. In this case Parker, C. J., states, that "it seems to have been well settled, heretofore, that if A. promises B., for a valuable consideration, to pay to C., the latter may maintain assumpsit for the money." And he further says, "The principle of this doctrine is reasonable, and consistent with the character of the action of assumpsit for money had and received."

In cases of this description, although the promisor undertakes to pay the debt of another, yet he thereby pays his own debt; and that constitutes the operative mode and inducement, by which he is actuated. To him it must be a matter of indifference, whether he pays directly to his creditor, or to his assignee. He pays no more; and he can be holden to pay but once.

These are not cases within the meaning of the statute, which requires evidence, not susceptible of being easily perverted by fraud or perjury, before one man can be held obliged to pay the debt of another, and trust to his solvency for reimbursement. But if the original debtor has paid him an adequate consideration therefor, either by the discharge of a debt due to himself, or by depositing money with him for the express purpose, and the party thereupon promises to pay as directed, why should not the undertaking inure to him, for whose benefit it is intended? As this can not operate to the injury of the promisor, there is no reason why the law should require evidence of a more certain character, to prove the substitution, than to prove the promise directly to him from whom the consideration moved. We are, therefore, of opinion, that this is not a case within the statute of frauds; and that, according to the authorities, the alleged want of privity constitutes no sufficient objection to a recovery on the part of the plaintiff.

The defendant reserved, by the direction and consent of Heald, of whom he purchased, a sufficient portion of the purchase-money to pay the notes in question. When, therefore, the plaintiff had a right to demand it, he might well declare for it as for so much money had and received to his use. If the defendant did not actually receive money he received that for which he agreed to pay a certain sum in money, part of which was appropriated in his hands to pay the plaintiff.

For such part of the amount as had been due six years, prior to the commencement of the action, which was in October, 1823, the plaintiff is barred by the statute of limitations. For such portion as becomes due within that period, he may recover. This rule being applied, all the notes are barred, except that which became due last; and as the interest was payable annually, the plaintiff can not be allowed upon this note that part of the interest, which became due more than six years prior to the action.

The verdict being amended in conformity with this opinion, judgment is to be rendered thereon.

KENNEBEC BANK v. TUCKERMAN.

[5 GREENLEAF, 130.]

GIVING FURTHER TIME to the maker of a promissory note, in pursuance of an agreement therefor, will discharge the surety who has requested the payee to collect from the principal.

ASSUMPSIT on a promissory note against Tuckerman, as maker. The note was a joint and several one, payable fifty-seven days from date, with grace, and signed by Adams, with two sureties. Before the note was discounted at plaintiff's bank the defendant wrote his name across the back. The defense was, neglect to sue the maker for several years, in pursuance of an agreement for forbearance, notwithstanding defendant's request that the note be collected. Verdict for the plaintiff by consent.

Sprague, for the defendant, urged that his liability was that of an indorser merely: *Herrick v. Carman*, 12 Johns. 159; *Nelson v. Dubois*, 13 Id. 175; *Campbell v. Butler*, 14 Id. 349; *Tillman v. Wheeler*, 17 Id. 326; that whatever the original liability might have been, it was now absolved, both by the right of the plaintiffs to enforce their remedy against the principal, and by their having given him new and further credit: *Ludlow v. Simond*, 2 Cai. Cas. 1 [2 Am. Dec. 291]; *Boynton v. Hubbard*, 7 Mass.

118; *Rathbone v. Warren*, 10 Johns. 587; *Rees v. Berrington*, 2 Ves. jun. 540; *Duval v. Trask*, 12 Mass. 156; *Aylett v. Hartford*, 2 W. Bl. 1317; *Pain v. Packard*, 13 Johns. 174 [7 Am. Dec. 369]; *King v. Baldwin*, 17 Id. 384 [8 Am. Dec. 715].

E. T. Warren, contra. No indulgence to the principal can discharge sureties or indorsers, unless it is such as to affect the contract itself and impair their remedy over: *White v. Howland*, 9 Mass. 314 [6 Am. Dec. 71]; *Hunt v. Bridgham*, 2 Pick. 581 [13 Am. Dec. 458]; *Crane v. Newell*, Id. 612 [13 Am. Dec. 461]; 3 Stark. Ev. 1389, note.

By Court, MELLAN, C. J. The defendant having signed his name in blank, on the back of the note in question, has made himself answerable in the same manner as though he had signed it in the usual form, as the other promisors did. All the four persons are to be considered as having promised jointly and severally. The only question is, whether the defendant who, it is admitted, was only a surety with others for Benjamin Adams, the principal, has been discharged from his original liability by reason of the transactions which took place between the bank and the principal. This original liability of the defendant as a copromisor, seems established by the cases of *Carver v. Warren*, 5 Mass. 545; *White v. Howland*, 9 Mass. 314 [6 Am. Dec. 71]; and *Moies v. Bird*, 11 Mass. 436 [6 Am. Dec. 179].

As to the main question the facts are few and simple. The note continues to lie in the bank from the time it was discounted until May, 1825, nearly eight years, not renewed in form; but the plaintiffs agreed with the principal to allow him further time, and the principal, every sixty days, paid the interest on the note in advance, during the above period. This course of proceeding was pursued probably for convenience; and as between the bank and the principal at least was equivalent to a renewal of the note every sixty days; and the receipt of interest in advance for sixty days was an agreement to give credit for that term.

The transaction can admit of no other construction, consistently with honesty and fairness; and it could not have been considered in any other manner by the parties immediately concerned. It has been said that parol agreements can not be made by a corporation; but they may be and usually are by bank directors, in relation to subjects of this nature; we therefore do not deem this a valid objection. By the report, it does not appear that this long delay and course of proceeding were even known to the defendant; it is stated to have taken place

after he had requested the plaintiffs to collect the note of the principal. It remains only for us to apply the law to these facts. A mere delay to sue the principal and collect the money of him, does not discharge the surety, as is admitted by the defendant's counsel, and is established by *Locke v. United States*, 3 Mason, 446; and by numerous other decisions, which are collected in the case of *Hunt, Executor, v. Bridgham et al.*, 2 Pick. 581 [13 Am. Dec. 458]; provided such delay be unaccompanied by fraud, or an agreement not to prosecute the principal. But in the same case, and those therein cited, it is also settled that such an agreement does discharge the surety; and in *Pain v. Packard*, 13 Johns. 174 [7 Am. Dec. 369]; and *King v. Baldwin*, 17 Id. 384 [8 Am. Dec. 715]; in each of which there was a request by the surety to proceed against the principal, and a prolongation of credit to him, though there was no contract for delay, it was decided that the surety was discharged. In the case at bar, all three of the circumstances which have been considered as tending to the discharge of a surety are found to exist; there was long delay and repeated credit given to the principal; there was a request by the surety to collect the note of him; and there was an agreement on the part of the plaintiff to give further time; pursuant to which all proceedings against the principal have been delayed. On these facts, the action can not be maintained.

Verdict set aside and nonsuit entered.

INDULGENCE TO PRINCIPAL RELEASING SURETY.—See *Buchanan v. Bordley*, 1 Am. Dec. 387; *Baird v. Rice*, Id. 497; *Butler v. Hamilton*, 2 Id. 692; *Commissioners v. Ross*, 5 Id. 383; *People v. Jansen*, Id. 275, and note; *Pain v. Packard*, 7 Id. 369, and note; *Fulton v. Matthews*, 8 Id. 261.

GARDINER v. NUTTING.

[5 GREENLEAF, 140.]

AN ACKNOWLEDGMENT OR NEW PROMISE, by the maker of a promissory note, does not affect the right of collateral parties.

THE ALLOWANCE OF A NOTE as a claim against the estate of a deceased insolvent, by a guarantor of the note appointed commissioner of the estate, can not be construed an acknowledgment by him, so as to stop the running of the statute as against him.

ON AN AGREED STATEMENT OF FACTS, where there is no special limitation, the defendant should have judgment, if the facts would verify any plea which would be a bar to the action.

ASSUMPSIT against Nutting and others, as collateral guaran-

tors of a promissory note. The opinion states the case, which came before the court on an agreed statement.

Allen, for the plaintiff.

Evans, contra, to prove that the admissions of a principal debtor would not bind collateral stipulators, cited 2 Stark. Ev., 893, 896, 897; *Bangs v. Hall*, 2 Pick. 368 [13 Am. Dec. 437]; *Danforth v. Culver*, 11 Johns. 146 [6 Am. Dec. 361]; *Lawrence v. Hopkins*, 13 Id. 288; *Clementson v. Williams*, 8 Cranch, 74; *Rowcroft v. Lomas*, 4 M. & S. 458; *Hillings v. Shaw*, 7 Taun. 608; *Perley v. Little*, 3 Greenl. 97; *Pittam v. Foster*, 2 Dow. & Ry. 363.

By Court, WESTON, J. This is an action of assumpsit against the defendants, as guarantors of a note of hand. Under leave to plead double, they pleaded first, the general issue; secondly, the statute of limitations; subsequently to which the parties have submitted the cause to the determination of the court, upon an agreed statement of facts. From this it appears that on the ninth of July, 1819, the firm of George and Ira Getchell gave their negotiable note to the defendants for seventy-five dollars, payable in five months. On the twenty-ninth of September, 1819, the defendants transferred said note to the plaintiff, and subscribed the following words written thereon: "We hereby guarantee the payment of the within." The Getchells, the makers, were copartners. In the summer of 1822, Ira deceased. His estate was represented insolvent, and the defendant, Nutting, appointed one of the commissioners to receive and examine the claims of creditors. The note in question was laid before them by the plaintiff, allowed, and a dividend received by him of thirty-nine dollars and fifty cents. At the time of presenting the note for allowance, the defendant, Nutting, expressed to the plaintiff's agent his surprise that it had not been collected, and inquired from whom he expected to collect the balance, which Ira's estate might not pay; and was told in reply that the plaintiff would look to the defendants; whereupon Nutting denied their liability. Ira Getchell was solvent for more than two years after the note became due; and George, after that period, was employed by the plaintiff upon several important contracts, and received from him, from time to time, considerable sums of money. The plaintiffs never applied to the Getchells for the payment of this note, or made any demand upon the defendants therefor, until since the commencement of the last year.

The counsel for the defendants rest their defense upon two grounds: 1. That the plaintiff, by his negligence and remissness, has lost his remedy against them as guarantors; 2. That he is barred by the statute of limitations. The counsel for the plaintiff contends that the latter point is not open to the defendants, inasmuch that it was not expressly reserved to them in the case presented to the court. To this it may be replied that, being pleaded and the facts agreed, it may be considered as one of the questions directly submitted, whether the defense is sustained upon this ground. But independent of the plea, in an agreed state of facts the principle is, if there be no special limitation in the statement that the defendant is to have judgment, if the facts would verify any plea, which would be a bar to the action.

The note became due and the action accrued against the defendants on the ninth of December, 1819. The present action was commenced in March, 1826, more than six years thereafterwards. The action was then barred, unless it appear to have been taken out of the statute by a new promise. And it is insisted that the claim made before the commissioners and its allowance is tantamount to a new promise, both on the part of the makers and of the defendants. Several authorities have been cited to show that it has this effect as it respects the makers; and it is contended that an admission and promise by one of several persons jointly and severally liable, defeats the operation of the statute as it respects the whole. But in this case the makers and the defendants were never jointly liable to the plaintiff. The undertaking of the defendants was independent of and collateral to that of the makers. Neither of these collateral parties has a right to affect or vary the liability of the other. Each may rest upon any legal ground of defense which no admission of the other can defeat. There can be no question that a party attempted to be charged as the indorser of a negotiable note, may be protected by the statute of limitations, notwithstanding the maker may have a direct and positive promise to pay the same within six years.

But it is further contended that the allowance of this note by Nutting, one of the defendants, as commissioner, ought by law to have the effect of a new promise on his part. There is certainly little foundation for this position; as the case finds that he made protestation at the time that he was not liable. But independent of that the allowance was a mere act of official duty which he had undertaken to perform. The note being

perfect evidence of a debt against the estate of the deceased, he could not do other than allow it. The statute of limitations had not then attached, as it since has, by lapse of time; and we perceive nothing in the case which can legally deprive the defendants of their right to insist upon it as a bar to the plaintiff's action. Being satisfied that the defense is supported upon this ground, it becomes unnecessary to consider the other point raised in this case by the counsel for the defendants.

According to the agreement of the parties the plaintiff is to become nonsuit, and the defendants to be allowed their costs.

WHITE v. PHILBRICK.

[5 GREENLEAF, 147.]

JUDGMENT IN TROVER on which execution has issued but not satisfied, is a bar to an action of trespass brought by the same plaintiff against another person for taking the same goods.

TRESPASS *de bonis asportatis*. The defendant, a coroner, had seized the goods in execution at the suit of Benjamin Adams against one Levi Barrett, for which taking the plaintiff brought trover against Adams and recovered judgment. But not being able to obtain satisfaction on the execution, Adams having absconded, the plaintiff, White, brought this action for the original taking. The question submitted was whether this action was maintainable.

Boutelle, for the plaintiff, contended that it was not the judgment in trover that would bar this action but the satisfaction thereof, and that as the judgment had not been satisfied this action would lie: Bro. Abr. Judgment, 98; *Brown v. Wootten*, Yelv. 67; Cro. Jac. 73; Moor. 762; *Livingston v. Bishop*, 1 Johns. 290 [3 Am. Dec. 830]; *Campbell v. Phelps*, 1 Pick. 62 [11 Am. Dec. 139]; *Rawson v. Turner*, 4 Johns. 469; *Drake v. Mitchell*, 3 East, 251.

Allen, contra.

By Court, **WESTON, J.** In regard to the principal question presented in this case, there is a great want of clearness in the authorities. According to the case of *Brown* or *Broome v. Wootton*¹, cited from Yelverton, the former judgment in trover by the plaintiff against Adams's execution being sued out thereon, although without satisfaction, is a good bar to the action.

1. *Brown v. Wootten*, Cro. Jac. 73; Yelv. 67.

The reason for this decision, as there reported, is that what was before uncertain is by the judgment made certain; *transit in rem judicatam*; and so altered and changed into another nature than it was at first. Mr. Metcalf, the learned editor of Yelverton, in his note upon this authority says that he finds no case in which the point therein decided has been otherwise adjudged; but he shows very satisfactorily that the reason assigned, namely, uncertain damages having become certain by the first judgment, is not supported by the authorities. And there is as little foundation for the opinion, that merely because the original cause of action had passed into a judgment against one of the parties liable, no collateral remedies for the same cause could be pursued against others who were also liable. In the case of joint and several obligors and promisors, against whom it is a very common practice to bring several actions, it never was pretended that a judgment in one was a bar to another. The case cited is reported in Cro. Jac. 73, where the reason assigned by Fenner, J., is, that in case of trespass, after the judgment given, the property of the goods is changed so as he may not seize them again. Mr. Metcalf admits that if this principle be correct the decision may be supported on that ground. In *Adam v. Broughton*, 2 Stra. 278¹, the court decided that a recovery in trover against one vested the property in him, although he had obtained an injunction on the judgment; so that the plaintiff could not, in the second action, say that the goods were his. Chitty, in his treatise on Pleadings, 1 Chit. 76, says a recovery against one of several parties to a joint tort frequently precludes the plaintiff from proceeding against any other party not included in such action. And he cites *Broome v. Wootton*², in support of this position. It is laid down in 3 Dane Ch. 77, art. 1, sec. 2, that when the plaintiff recovers damages in trover for the value of the goods, the property of them rests in the defendant.

So far as a change of property consequent upon the judgment constitutes a good defense to a second action against another party, it is limited to actions of trover and of trespass *de bonis asportatis*, and does not apply to other actions of trespass. Parker, C. J., in *Cambell v. Phelps*, cited in the argument, appears to admit that both in trover and in trespass *de bonis asportatis*, the property rests in the defendant. This, Wilde, J., in the same action denies, unless upon satisfaction of the judgment. And he founds his opinion upon the princi-

1. 2 Stra. 1078.2. *Brown v. Wootten*, Cro. Jac. 73; Yelv. 67.

ple, the payment of the value, and not of the judgment, is that which operates a transfer of the property; and this upon the maxim, *solutio pretii emptionis loco habetur*. The party injured has unquestionably a right to retake his goods peaceably, at any time before judgment. If after that this remedy be gone, it is in consequence of his voluntary election to have judgment in damages for the value of the goods, upon the assumption that the other party has carried them away, or converted them to his own use. For the injury sustained, in which the value of the goods lost constitutes the principal ingredient, he has process of execution against the property and the body of the defendant, which is the highest civil remedy known to the law. Upon this process the property taken or converted, if still retained by the defendant, may be seized. From the nature of the remedy pursued, damages, and not the restoration of the property, is the indemnity sought. There are other modes of redress, at the election of the party, by which the law will aid him in reclaiming his property specifically. The authorities, therefore, which determine that the property in the goods passes, by the judgment, to the defendant, where it is taken for their value, do not seem to be hard or unreasonable. It is not so obvious how this change of property, which aggravates the damages on the part of the plaintiff, should defeat a collateral remedy against a co-trespasser. The reason assigned by Parker, C. J., in the case last cited, is, that as by the first judgment, "the property of the goods will vest in the defendant, and as no co-trespassers are entitled to contribution among each other, it would seem unjust that one should have all the property, and another pay all the damages." But the very rule adverted to, that the law will not enforce contribution among co-trespassers, shows that its decisions are not moulded with a view to the adjustment of any equities which may arise between them.

In the case of *Drake v. Mitchell*, 3 East, 252, Lord Ellenborough says, that "a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore, till then, it can not operate to change any other collateral concurrent remedy which the party may have." But the case of several securities for the same demand, was then under the consideration of the court, and this opinion must be held to be limited to actions founded on contract; and it is so regarded by Parker, C. J., in *Campbell v. Phelps* [11 Am. Dec. 139].

But notwithstanding the bearing of several cases to that effect, it must be held questionable whether a judgment merely, without satisfaction against one co-trespasser for goods carried away, or against one or several persons liable in trover, is a bar to an action against the others. There are, however, technical reasons, and legal authorities in support of the doctrine, that such judgment, if execution be taken out thereon, is to be regarded as a bar. And with this qualification, the cases, if not entirely reconciled, will be found more consistent with each other. It is certainly an established principle of law, that several actions may be brought for a joint trespass; and the authorities warrant their prosecution, at least, until the amount of damages is settled by verdict. But as the party injured can have but one satisfaction, he may make his election *de melioribus damnis*; and having made it, he is concluded by it. And herein this class of cases differs from collateral remedies on contract; as, for instance, against the maker and the several indorsers of a negotiable note of hand. The reason may be, that in the former, the several judgments may vary in amount, and as the damages depend upon opinion, and as there may be many just causes for a discrimination, such variance may be expected; but in the latter, each will be liable for the same amount, which is to be ascertained by calculation. Now when the plaintiff, in a several action of the former description, sues out execution, he makes his election.

In *Sir John Heydon's case*, 11 Co. 5, it was resolved, that where several juries assess different damages against several co-trespassers, the plaintiff may make his election *de melioribus damnis*; but that he can have but one execution. And although Kent, C. J., in 1 Johns. 290; *Livingston v. Bishop*, [3 Am. Dec. 330], cited in the argument, questions the extent of the decision of *Broome v. Wooton*, he admits that as execution had been sued out on the judgment held to be a bar, this may be deemed an election *de melioribus damnis*, and thus be held sufficient to foreclose other collateral remedies.

Upon the whole, as the case of *Broome v. Wooton*, is exactly in point; as it does not appear to have been overruled, and as it may be supported upon the ground last stated, although not for the reasons assigned in that decision, we are of opinion that the judgment and execution, obtained by the plaintiff against Adams for the same causes, is a bar to this action.

Plaintiff nonsuit.

TITLE PASSING BY JUDGMENT: See *Woolley v. Carter*, 11 Am. Dec. 520, and note.

The principal case, so far as it decides that by the rendition of the judgment merely, in an action of trespass *de bonis asportatis*, the title to the land passes to the defendant, is said in *Murray v. Lovejoy*, 2 Cliff. 191, 198, not to rest on any substantial basis. Upon this point the principal case is in harmony with *Campbell v. Phelps*, 1 Pick. 61; *Broome v. Wooton*, Yelv. 67; *Adam v. Broughton*, 2 Stra. 1078; *Emery v. Nelson*, 9 Serg. & R. 12; *Buckland v. Johnson*, 15 C. B. 145; S. C., 23, L. J. C. P. 204. But the better opinion is, that until the judgment is satisfied, the title to the property for which judgment has been recovered does not vest in the defendant: *Osterhaut v. Roberts*, 8 Cow. 43; *Spivey v. Morris*, 18 Ala. 254; *Smith v. Alexander*, 4 Sneed, 482; *Sanderson v. Caldwell*, 2 Aik. 203; *Jones v. McNeil*, 2 Bai. 446; *Morgan v. Chester*, 4 Conn. 387; *Hyde v. Noble*, 13 N. H. 501; *McGee v. Overby*, 7 Eng. 164; *Sharp v. Gray*, 5 B. Mon. 4; *Hepburn v. Sewall*, 5 H. & J. 212; 9 Am. Dec. 512; *Lovejoy v. Murray*, 3 Wall. 1; *Elliott v. Hayden*, 104 Mass. 180; *Smith v. Smith*, 5 N. H. 219; *McReady v. Rogers*, 1 Neb. 127; *Brinsmead v. Harrison*, L. R. 6 C. P. 588.

CRAM v. BURNHAM.

[5 GREENLEAF, 213.]

COHABITATION KNOWN TO BE ADULTEROUS in its origin, a wife being then alive, gives no rights to the guilty parties against third persons; nor does the continuance of such cohabitation after the death of the wife, afford legal presumption of a subsequent marriage.

ASSUMPSIT on a promissory note made by the defendant's intestate, payable to Maria Cram, alleged to have been then, and still to be, the wife of Jacob Cram, the plaintiff. The evidence to support the alleged marriage appears from the opinion. Verdict for the plaintiff subject to the opinion of the court.

N. Emery and D. Goodenow, for the defendant.

J. Shepley, contra, cited *Fenton v. Reed*, 4 Johns. 52 [4 Am. Dec. 244]; 1 Com. Dig., tit. Baron and Feme, B. 1.

By Court, WESTON, J. In order to sustain this action, it is incumbent on the plaintiff to prove that he is the husband of the woman, who, in the note declared on, is called Maria Cram. It is in evidence that they have cohabited together, and that they claim to stand to each other in the relation of husband and wife. In most cases cohabitation, as husband and wife, is evidence from which the law presumes a lawful marriage. So also where the presumption may be repelled, it will fix upon the party, who thus holds himself out to the world in the character

of a husband, liabilities as it respects others which attach to this relation.

There is another class of cases, where the parties, without any imputation upon their innocence or purity, live together in the fullest belief that they are lawfully married; although in fact the marriage may not be lawful, from a want of authority in the person by whom it may have been solemnized, or from some other legal defect in point of form. These have often been recognized as marriages *de facto*, for which, to a certain extent, rights and duties may arise, as it respects both the parties themselves and their children. If the plaintiff had relied upon cohabitation alone, as evidence of a legal marriage, it might have justified the presumption that a lawful marriage had taken place, when he might lawfully enter into that connection. He, however, introduces and relies upon proof of the solemnization of his marriage at a certain period. It fully appears that at that time, he being the husband of another woman, then in full life, this pretended marriage was clearly void.

Until the death of the lawful wife, their cohabitation was lewd and lascivious, and would have subjected him to severe punishment, and Maria Adams also, if conscious of the first marriage, and that his lawful wife was still alive. After her death, their cohabitation, although not attended with a breach of marriage vows, was still an offense against decency and good morals, for which they would have been liable to a legal prosecution. It is in proof that the nature and circumstances of their connection were known to the neighborhood, and that neither party made any secret of the facts by which its criminality was made apparent. If the plaintiff can predicate rights upon a course of conduct thus flagrant, as well might he do it if his lawful wife had resided in the same town. If she had been unfaithful, and that fact had been verified before the proper tribunal, he might have been legally absolved from the obligation he had assumed; but a mere pretense of this sort, which he appears to have set up, and which might have been altogether without foundation, afforded him no justification whatever. Having neglected the duties of a husband towards her to whom they were rightfully due; having violated his marriage vows, and openly lived in an adulterous connection with another woman; in the face of these facts, he now claims, in relation to her, the rights and prerogatives of a husband, in consequence of a pretended solemnization of marriage, which he knew to be void. To sustain a claim of this sort, would comport neither with public policy, with good morals, nor with law. The plaintiff

might be liable to others, as the husband of Maria Adams; but it is one thing to incur liabilities, and another to establish rights.

In the case of *Fenton v. Reed*, [4 Am. Dec. 244], cited in the argument, the right of the original plaintiff was not predicated upon an unlawful connection then continuing, like the case before us; but upon one believed to be innocent in its commencement, and, under the circumstances, not liable to be prosecuted as an offense, and which had ceased by the death of him whom the plaintiff regarded as her second husband. Even there the court pronounced the second marriage void; but sustained her demand, which they probably deemed equitable upon the merits, upon the ground that subsequent to the death of the first husband, another marriage might be presumed. In the case before us no such presumption can arise. The plaintiff does not depend upon presumption. The marriage upon which he relies, and of which he furnished formal proof, is that solemnized before the death of his lawful wife, and which is therefore inoperative and void. The court in New York say that a contract of marriage, *per verba de præsenti*, amounts to an actual marriage without any formal solemnization. They cite the case of *McAdam v. Walker*, in the house of lords, 1 Dow. 148, which was an appeal from the court of sessions in Scotland, where Lord Eldon states the law in the same manner, which he says is warranted by the law of Scotland, and by the canon law. It might deserve great consideration, whether a doctrine so broad would be sanctioned in this state.

In *Cunninghams v. Cunninghams*, also in the house of lords, on an appeal from the court of session in Scotland, 2 Dow. 482, which is to be found in a note to 4 Johns. 53, Lord Eldon and Lord Redesdale held "that in cases of cohabitation, the presumption was in favor of its legality; but where it was known to have been illicit in its origin, that presumption could not be made." And such is the case now under consideration.

As to the argument that the defendant's intestate, by giving the note to the woman by the name of Maria Cram, recognized her as the wife of the plaintiff, he might not have known the circumstances of their connection; and his administratrix is well justified in requiring proof of the plaintiff's legal title to the note in question.

New trial granted.

COHABITATION AS EVIDENCE OF MARRIAGE.—See *Fenton v. Reed*, 4 Am. Dec. 244, and note; *Allen v. Hall*, 10 Id. 578.

MARRIAGE PER VERBA DE PRÆSENTI.—See *Londonderry v. Chester*, 9 Am. Dec. 61, and note.

ALLEN v. SAYWARD.

[5 GREENLEAF, 227.]

A COVENANT BY AN EXECUTOR in a conveyance of the estate of the testator is binding on the executor.

ESTOPPEL BY DEED.—Covenants of lawful seisin in fee and good right to convey do not estop the grantor from setting up an after acquired title against the grantee.

THE WORD "GIVE" in a deed of bargain and sale does not, in Maine, import a covenant of warranty.

TRESPASS *quare clausum fregit*. The plaintiff derived title under a deed from the defendant and Henry Smith, as executors of the will of one Ebenezer Sayward. There were no covenants in the deed, except that the executors had good right, and lawful authority under the will, as executors, to sell and convey the premises to the grantee. The defendant offered to show a paramount title to a part of the land acquired by himself subsequently to the conveyance to the plaintiff; and Preble, J., before whom the cause was tried, ruled that defendant was not estopped by his deed as executor. The defendant further contended that the deed to the plaintiff by calling for a boundary "to a white oak tree marked, or to the Moulton line," did not thereby bound the plaintiff by the tree, unless it stood in the Moulton line. But the judge ruled that the Moulton line must be considered as being at the tree; and that the plaintiff could not be prevented from holding up to the tree by any proof that the line did not extend to it.

Verdict for the plaintiff, subject to the opinion of the court.

Appleton and J. Shepley, for the defendant, urged that he was not estopped by the covenants in the deed, as they went only to the existence of the executors' authority: *Shep. Touch.* 163; *Browning v. Wright*, 2 Bos. & P. 13; *Griffith v. Goodhand*, T. Raym. 464; *Frothingham v. March*, 1 Mass. 247. That upon no principle could the doctrine of estoppel be invoked in this case, as the deed contained no covenant of warranty: *Jackson v. Wright*, 14 Johns. 193; Co. Lit. 265; *Jackson v. Mills*, 13 Johns. 463. That an executor had no power to bind the estate of his testator by personal covenants: *Sumner v. Williams*, 8 Mass. 201 [5 Am. Dec. 83]; and, therefore, those used should be construed in relation to the whole subject-matter.

J. Holmes and D. Goodenow, contra. All the parties to a deed are estopped to gainsay anything in it: *Jacob's Law Dict.* verb. *Estoppel*, 2 Bl. Com. 295; *Wolcot v. Knight*, 6 Mass. 418;

Adams v. Frothingham, 3 Mass. 253 [2 Am. Dec. 151]; *Porter v. Hill*, 9 Id. 34 [6 Am. Dec. 22]; *Poor v. Robinson*, 10 Id. 136; *Goodtitle v. Morse*, 3 T. R. 370; *Commonwealth v. Pejepscut Propr's*, 10 Mass. 155; *Sumner v. Williams*, 8 Mass. 162.

By Court, Weston, J. In order to determine whether the defendant is estopped to claim the land in question by reason of the former conveyance, it becomes important to ascertain what covenants he entered into by that deed. The covenants, whatever they are, must be deemed his own, as he had no authority thus to bind the estate of his testator.

By the use of the word "give," in the deed of the executors, it is insisted a covenant of warranty arises by implication of law during the lives of the grantors. The legal effect of the term *dedi* is derived from feudal times. So long as a tenure was created by the use of this term, and the feoffee and his heirs held of the feoffor and his heirs by certain services, the law held the latter to warrant and defend the land, which was the consideration for these services. But after subinfendations were abolished by the statute of *quia emptores*, and the feoffee, instead of holding of the feoffor, held of the chief lord of the fee; by the word "give" (*dedi*), the feoffor only was bound to warranty, and not his heirs. By this covenant, thus raised by implication of law in a feoffment, does not arise from the use of the same term in instruments which derive their efficacy from the statute of uses: 2 Bl. Com. 301. Of this description are conveyances in this state. That in most general use is a deed of bargain and sale. It is true that to effectuate the intentions of the parties, courts may and do construe a deed in this form to be a feoffment, a covenant to stand seised, or any other instrument known to the law, for the conveyance of real estate. The deed in question is a deed of bargain and sale. It was a mode apt, appropriate, and effectual for the purpose intended. No other end is to be answered by regarding it as a feoffment, except that of raising by implication of law a covenant of warranty against the executors; a covenant which they were under no obligation to make; and which they can not be presumed to have intended. And after all it would be questionable whether they would be bound by any other than express covenants.

The only covenant expressed is, that they had good right and lawful authority under and by the will, and as executors thereto, to sell and convey the premises. It is certainly far from being clear that anything more was intended than that they were duly qualified as executors, and that they derived

from the will sufficient authority to sell the real estate of their testator. Beyond that neither the duty of their office nor common prudence required them to go. Whether any, and what estate, whether defeasible or indefeasible, the deceased had in the premises, the purchaser had the means of being satisfied from other sources. And to inquiries of this sort he would be impelled by the common principle of *caveat emptor*, which has its chief application in the purchase of real estate. In the case of *Sumner v. Williams* [5 Am. Dec. 83.], the majority of the court who decided in favor of charging the administrators upon the covenant of warranty, did so upon the ground that a covenant of this sort was clearly and fully expressed by the terms of the deed, although there was much reason to doubt whether they intended to bind themselves personally. But as they alone could be bound, there was no alternative but to hold them or reject the covenant as altogether inoperative. Taking this covenant in its utmost latitude, it may be construed to mean that the testator died seised, and that there was then no adverse seisin. This may have been true, and is not necessarily inconsistent with an after acquired title on the part of the defendant. Where a party has given a deed with a warranty of land, of which he had not a sufficient title, if he afterwards acquire a good title, inures to his grantee by way of estoppel; and this to avoid circuitry of action. But a covenant of seisin, or what is equivalent, that the party has good right to convey, does not thus operate upon an after acquired title. The party may have been seised, and may have conveyed his seisin to his grantee, by which these covenants are supported and verified; the seisin of the grantee may afterwards be divested upon elder and better title, and this may be subsequently lawfully purchased by the grantor for his own use and benefit, and it will not inure to the grantee, who in such case can have no claim whatever for breach of covenant. The opinion of the court, therefore, is, that the deed given by the defendant and his co-executor does not estop him from adducing in evidence and maintaining a paramount title by him subsequently acquired.

It has been insisted that to permit him to do so would be to enable him to commit a fraud upon the plaintiff. If this title had vested in him before the date of his deed as executor, either that transaction, or his attempt afterwards to defeat the conveyance, by a prior title of his own, would have been a fraud upon the plaintiff; in which case, if he could sustain his own title, which he would certainly not be suffered to do in

chancery, and possibly not at law, he would at least be holden to refund to the plaintiff the purchase-money thus fraudulently obtained. But he was at liberty afterwards to acquire a title of a party having lawful authority to convey; and the enforcement of rights accruing subsequently, would be no fraud upon the plaintiff. But it is urged that his grantor, not being seised, had no right to convey. That is a question not presented in the report of the judge. If the deed under which the defendant claims, is liable to this objection, it may avail the plaintiff hereafter.

New trial granted.

EFFECT OF EXECUTORS' COVENANTS IN THEIR CONVEYANCES.—An executor is not bound to convey with any covenants, save against incumbrances of his own making: *Grantland v. Wight*, 5 Munf. 295; *Goddin v. Vaughn*, 14 Gratt. 102; *Ennis v. Leach*, 1 Ired. Eq. 416; *Aven v. Beckom*, 11 Ga. 1; *Murphy v. Price*, 48 Mo. 247; *Craddock v. Stewart*, 6 Ala. 77; Rawle on Covenants, 50. Not only is he not bound to enter into covenants for title, but he is not authorized to do so. He must do everything necessary to put the grantee in the same situation that the decedent was in: *Hodges v. Saunders*, 17 Pick. 476; but his covenants for title can not bind the estate: *Mason v. Ham*, 36 Me. 573; *Mabie v. Matteson*, 17 Wis. 11; *Osborne v. McMillan*, 5 Jones' Law, 109; *Worthy v. Johnson*, 8 Ga. 236; *Aven v. Beckom*, 11 Id. 1; *Lockwood v. Gibson*, 12 Ohio St. 526. Therefore, if he enter into any such covenants, the courts will, as a general proposition, construe them as personal, and will hold him responsible: *Sumner v. Williams*, 5 Am. Dec. 83; *Mitchell v. Hazen*, 10 Id. 169; *Lockwood v. Gibson*, 12 Ohio St. 526; *Aven v. Beckom*, 11 Ga. 1; *Magee v. Mellon*, 23 Miss. 586.

In *Mitchell v. Hazen*, 4 Conn. 495, 514, 10 Am. Dec. 169, it is stated to have long been "an established principle that whenever a man undertakes to stipulate for another, by an instrument under seal, without authority or beyond authority, he is answerable, personally, for the non-performance of his contracts; and if he choose to bind himself, by a personal covenant, he is legally liable for a breach of it, even although he describes himself as covenanting as trustee, agent, executor, or administrator: *Appleton v. Binks*, 5 East, 148; *Thacher v. Dinsmore*, 5 Mass. 299 [4 Am. Dec. 61]; *Sumner v. Williams*, 8 Id. 162 [5 Am. Dec. 83]; *Duval v. Craig*, 2 Wheat. 45; *White v. Cuyler*, 6 T. R. 176; *Wilks v. Back*, 2 East, 142; *Tippets v. Walker*, 4 Mass. 596; *Thayer v. Wendall*, 1 Gallis. 37." The sale in *Mitchell v. Hazen*, was made by an administrator under an order of court, which not having prescribed the manner in which it was to be executed, "authorized him to make such an instrument only as was legally proper for the conveyance of the deceased's estate." Covenants of seisin, quiet enjoyment and right to convey having been inserted in the conveyance, the administrator, though signing as such, was held personally liable. In this instance, however, the facts were particularly strong against the personal representative, as he covenanted, not only in his own name, but for his heirs, executors and administrators.

Aven v. Beckom, 11 Ga. 1, on the contrary, presented facts which illustrate, it is conceived, the utmost limit to which the doctrine of the executor's personal liability can be extended. The administrator sold a negro belonging

to the estate of his decedent, with the following warranty: "And the said Furney C. Aven, administrator, warrants said negro constitutionally sound; and he also warrants and defends t^he title to the said negro, to said Allen Beckom, his heirs, executors and administrators, against the claims of himself, his heirs, and all other persons whatsoever, so far as the office of administrator authorizes him forever." Nisbet, J., delivering the opinion of the court, after premising that, were the question an open one, he would hesitate to charge an administrator personally upon a warranty of soundness of property sold under an order of court, made as administrator, and without evidence that he intended to charge himself, stated that the principle was settled, and that an executor was not bound to enter into such warranty, yet might do so, and might render himself responsible, and then proceeded:

"When, therefore, an administrator, in his representative character, warrants the soundness of property which he sells as the property of the estate which he represents, the estate can not be made liable thereon. By the terms of such a warranty, we are constrained to believe that he intends to become personally responsible. It is therefore argued that the warranty is a mere nullity; and it really seems quite a hardship to charge one with liability on a contract in which he has no interest, and by the terms of which he has not bound himself. Still, to this extent have the courts gone. They have held that if neither party understood the undertaking to be personal, and it is in terms representative, yet the administrator is liable *de bonis propriis*. The case of *Sumner, Administrator, v. Williams et al.*, decided by the supreme court of Massachusetts [5 Am. Dec. 83], is the leading American authority upon this subject. This case was twice argued, and received the most careful consideration of that able bench. The court was divided, Sedgwick, J., dissenting, but the decision has stood the test of the severest scrutiny. By that decision an administrator was held personally liable upon a warranty of title made in his representative character. I refer to it now to sustain the proposition, that upon such a warranty he is personally liable, even although both parties do not intend him to be bound. Parker, C. J., in concluding his opinion says: 'This course of reasoning, and the authorities referred to, have satisfied me that the defendants are personally bound by the deed which they executed as administrators, notwithstanding their manifest intention not so to be bound:' 8 Mass. 162.

"When this warranty was given, it must have been believed by the purchaser to be intended to afford him some security for the soundness of the property. It is not reasonable to suppose that he asked, and that the administrator gave a warranty without a purpose. This would be to attribute puerile folly to both parties. It may be true that the administrator did not intend to bind himself, and knew that he could not bind his estate; yet, it must be inferred from the fact that a warranty was given by the administrator, that the purchaser understood this warranty to be an undertaking on his part to bind the estate. It being under seal precludes all inquiry as to consideration. The rule as applicable to the case, and the principle upon which the decisions rest, is this: 'whenever a man, by an instrument under seal, undertakes to stipulate for another, if he acts without authority or beyond his authority, he is answerable personally for the non-performance of the contract.' This is a doctrine of the law of agency, too well established to admit of denial." After considering this rule of agency quite fully, his honor continued:

"The liability does not depend upon fraud—it is in these cases perfect

without fraud in fact. If it could be made to appear that the agent knows at the time that he can not bind his principal by the stipulation into which he enters, then I apprehend that he is chargeable with fraud; and if this can not be made to appear, he is liable still upon the ground that he has, to the injury of another, assumed to do what in law he can not do; and it is not a sufficient reply that the purchaser is presumed to know the general law as well as the agent. The purchaser at an administrator's sale buys at his peril as to title and soundness. He has no right to ask or expect a warranty, either from the estate or the administrator personally, for the reason that the law does not permit the former and does not require the latter; so that when no warranty of any kind is given, and the purchaser is the loser, he has no cause of action or complaint. But if the administrator undertakes voluntarily to bind the estate, the case is different. The purchaser then acquires rights which spring out of such voluntary undertakings. Some effect is to be given to the undertaking—to the warranty in this case—and as the law pronounces it a nullity so far as the estate is concerned, the only legal effect of which it is capable is to make it obligatory upon the administrator. The natural inference to be drawn from it is, that he has, or believes himself to have, authority to bind the estate. His act in making the stipulation has the effect of drawing the other party into his reciprocal engagements, and when the law charges him personally, he has not, therefore, so much cause to complain. He may be asked, why make a warranty at all, since you are not required to make it? *Dunlap's Paley on Agency*, 386; 2 *Kent's Com.* 630; *Story on Agency*, sec. 264; 3 *Johns. Cas.* 70; 1 *Cowen*, 513; 7 *Id.* 453; 1 *Watts & S.* 222; 8 *Wend.* 494; 16 *Mass.* 461; 3 *Barn. & Ad.* 114; 11 *Mass.* 97; 7 *Wend.* 315; 2 *Taun.* 385; 1 *Esp.* 112; *Smith on Mercantile Law*, 80, 97; 8 *Mass.* 178. * * * *

"There can be no doubt but that executors and administrators come under this general doctrine of agency, whether they be called agents or trustees, the rule applies to them with all its force. They have no power to bind their estates, and when they assume to do so like mere agents, exceeding their power, or acting wholly without power, they bind themselves. The case in 8 *Mass.* [5 *Am. Dec.* 83], was the case of administrators, and in its principles and main facts like the case before me. In that case the administrators, upon a sale, under an order to sell the real estate of their intestate, of the equity of redemption in mortgaged premises, in their character as administrators, warranted the title. They were held liable personally in an action on their covenant of warranty. The only difference between this case and the case at this bar is that here there is a warranty of soundness of a slave, instead of the title to real estate, as there. This difference makes no distinction in principle. The opinion of Parker, C. J., in that case, was put upon the principle before stated and upon authority. We could not decide this case differently without overruling the supreme court of Massachusetts, when at its meridian of strength, as well as decisions, which preceded its judgment, in England, to say the least of them, analogous in principle, and decisions which have followed it in this country. See further, 3 *How. (Miss.)* 176; 14 *Conn.* 245; 7 *Monr.* 1; 3 *Porter*, 221; 2 *Mass.* 245; 1 *Bro. C. R.* 101; *Amb.* 707; 5 *Barn. & Ad.* 34; *Smith's Mercantile Law*, 144-147, and notes; 9 *Wheat.* 743; 3 *Barn. & Ad.* 114; 3 *T. R.* 761; *Bany v. Rush*, 1 *Id.* 691." The objection raised by the defendant's counsel that a warranty made "so far as the office of administrator authorizes him," could not render the administrator personally liable, was next considered; Judge Nisbit saying:

"I can not construe these words into a declaration that the party is not

personally bound. It is true that he says that he warrants, so far as the office of administrator authorizes him, and the inference unquestionably is, that he intends to be bound so far and no farther; that is, not personally bound. But is not precisely the same thing inferable in cases where the administrator warrants, in his representative character, or as administrator, as in the case of 8 Mass.; and yet those are the very cases to which the rule has been applied. If it applies to them, with equal clearness it applies to this. The extent of the undertaking is the same. In both cases I admit that it is plainly inferable that the party does not intend to bind himself; yet let it be remembered that the doctrine is, that upon these warranties the administrator is personally liable, although it be clear that his intention was not to bind himself. If the administrator, in explicit terms, stipulates that he shall not be bound, the other party would be also bound by the stipulation; and the warranty binding neither the estate nor the administrator, would be a mere nullity. But this is not done in this case. I can not distinguish it from cases where the party contracts as administrator. Contracting as administrator, he contracts so far as the office of administrator authorizes him; and contracting so far as the office of administrator authorizes him, he contracts as administrator."

So strict was this construction of an executor's or administrator's liability on his covenants considered that at the next meeting of the state legislature, Acts of 1853-54, p. 36, the following enactment was passed: "An administrator cannot bind the estate by any warranty in any conveyance or contract made by him, nor is he personally bound by such covenant, unless the intention of personal liability is distinctly expressed." This provision is incorporated into the code of Georgia of 1873, sec. 2563.

This statute throws the burden on the grantee of showing, by some distinct expression on the administrator's part, his intention to be personally responsible on his covenants made in a representative capacity. This wide departure from the ordinary rule, perhaps, would not have been effected but for the interposition of the law-making power. There are, however, decisions which form a class distinct from those favoring a strict liability of the executor. They do not shift the burden of proof upon the grantee, as indicated by the section from the Georgia code, but they greatly relieve the hardship of the executor's position by permitting him to demonstrate, by the language of his covenant, that he did not mean to be bound personally. Thus in *Maniffee v. Morrison's Executor*, 1 Dana, 208, the executors made a covenant of warranty "for themselves, their heirs, executors and administrators, to the extent of their assets," and it was held that no obligation was imposed upon them individually, nor beyond the assets in their hands. In *Day v. Brown*, 2 Ohio, 347, 348, the executors entered into covenant to warrant and defend the premises, "as executors are bound by law to do." The court, after noticing *Duval v. Craig*, 2 Wheat. 46, relied upon by the plaintiff to support his action against the executors on this covenant, say: "The terms that are used in a contract to show the character or relation in which the parties stand may be so used as to amount only to matter of description, or they may be so used as to limit and qualify the extent of their liability. In the cases referred to, the former was the fact, and the defendants were held personally responsible. But there is a striking difference between these cases and the one before us. Here the defendants not only describe themselves as executors of George Brown, professing to convey the title which he held at the time of his death, in pursuance of an order of the court of probate, but they expressly qualify and limit the operation of their covenant, so as to show that it was not the intention of either party that they should be personally bound. They undertake that they will warrant the title, so far

as executors are bound by law to warrant, but the statute under which the order was made and the deed was executed does not require them to warrant in any form or to any extent. It can not be necessary to consider the authorities cited to show that contracts are construed according to the intention of the parties, and that the intention must be gathered from the whole contract; nor will it be contended that the clause qualifying this covenant can be rejected. The terms used in that clause show it was not the understanding of the parties that the defendants were to be personally bound, which is decisive of the present question."

The executor, in *Thayer v. Wendell*, 1 Gall. 37, covenanted in his representative capacity, "but not otherwise," and Judge Story construed the covenant not to impose liability upon the executor in his private capacity.

These decisions would seem to engraft upon the general rule that the executor or administrator is personally liable on his covenants in his conveyances, the exception that he is not thus liable, where by the words of the covenant he expressly limits his responsibility. In such a case, the grantee could not allege that he was prejudiced by being induced to rely upon the individual responsibility of the executor.

STEARNS v. BURNHAM.

[5 GREENLEAF, 261.]

AN EXECUTOR UNDER THE LAWS OF ONE STATE can not indorse a note payable to the testator by a citizen of another state, so as to give the indorsee a right of action in his own name in the latter state. And this objection may be taken under the general issue.

ASSUMPSIT by the indorsee against the maker of a promissory note, payable to one Stearns, of Salem, Massachusetts, and indorsed by his executrix, a resident of the same town, and appointed under the laws of that state. The maker always resided in this state. It was tried before the chief justice; on the pleas of the general issue and statute of limitations. Verdict for the plaintiff, subject to the opinion of the court whether the action would lie.

N. Emery and Longfellow, for the defendant, cited *Goodwin v. Jones*, 3 Mass. 517 [3 Am. Dec. 173]; *Russell v. Swan*, 16 Id. 314; *Thompson v. Wilson*, 2 N. H. 291.

Greenleaf and Willis, contra, referred to *Chitty on Bills*, 108, 111; *Rawlinson v. Stone*, 3 Wils. 1; *Mosher v. Allen*, 16 Mass. 451; *Talmage v. Chapel*, Id. 71; and contended that the objection came too late, not having been pleaded: *Langdon v. Potter*, 11 Mass. 313.

By Court, MELLEN, C. J. The only question of any moment is, whether the plaintiff is entitled to maintain this action as indorsee of the note declared on, the same having been in-

dorsed by Mrs. Stearns, the executrix of William Stearns's will, proved and approved in Massachusetts. It is clear that the executrix herself could not maintain an action in our courts upon the note, as was decided in the case of *Jones v. Goodwin*, 3 Mass. 514.¹ The principles and reasons on which that decision is founded, are stated at large by Mr. Chief Justice Parson; and on this occasion a reference to that case is sufficient for a knowledge of the learning on the subject, so far as applicable to the present case. We would merely observe that the power of the executrix, by law, is to administer all the goods, chattels, rights, and credits of the testator which are within Massachusetts. Debts due to the testator at the time of his death from persons residing in other states are placed by law on the same ground as goods and chattels belonging to him, and being in another state. Over these she, as executrix, deriving her authority under the laws of Massachusetts, has no control. We are then led to inquire how an executor or administrator, acting under an authority derived from another state, can, by indorsing a note from one of our citizens, give to his indorsee a power which he himself does not possess, that is, of successfully suing for and recovering it in our courts. If this can be done, it will be an indirect mode of giving operation in this state to the laws of Massachusetts as such, or in other words, to an authority derived directly from laws which are not in force in this state.

By adopting such a principle, the effects or credits of a testator or intestate, found in this state, might be withdrawn, which may be necessary for satisfying debts due from such testator or intestate to citizens of this state. Such a principle or course of proceedings has often been successfully opposed: 3 Mass. 517 [*Goodwin v. Jones*, 3 Am. Dec. 173]; 4 Id. 324; 8 Id. 515; 9 Id. 350 [*Dawes v. Boylston*, 6 Am. Dec. 72]; 11 Id. 269; 3 Pick. 128; 5 Cranch, 289; 1 Gal. 429; 13 Mass. 146 [*Ingraham v. Geyer*, 7 Am. Dec. 132]. No such consequence would follow if the executrix should be held to prosecute for collection of the money due on the note in her own name; for before she could do this, she would be obliged to file a copy of the will of the testator in some probate court in this state, and have the same there recorded; this having been done, the judge of probate would thereupon proceed to take bond of the executrix, and settle the estate (lying or being in this state) in the same way and manner as he may the estates of testators whose wills have

1. *Goodwin v. Jones*, 3 Mass. 514 [3 Am. Dec. 173].

been duly proved before him. See fourteenth and seventeenth sections of the stat. 1821, c. 60. The principles of justice and policy, on which the above-mentioned provisions of our statute are founded would seem to lead our courts of law to that course of proceeding in a case like the present, which would harmonize with those principles and have a manifest tendency to produce the same beneficial results. This must have been the ground of the decision in the case of *Thompson v. Wilson*, 2 N. H. 291. The facts of that case are exactly similar to the one under consideration, and the court decided that the action could not be maintained. It has been said that the objection which has been urged is good only in abatement; but we are very clear that it is sustainable on the general issue, inasmuch as it shows that no title was derived under the indorsement, to maintain this action, any more than if the indorsement had been a forgery.

We are all of opinion that the verdict must be so amended as to stand as a verdict in favor of the defendant, and judgment be entered thereon accordingly.

THE AUTHORITY OF THIS DECISION IS DOUBTED in the following language from *Rand v. Hubbard*, 4 Met. 252, 257, used by Chief Justice Shaw: "We are aware that it has been decided in New Hampshire: *Thompson v. Wilson*, 2 N. H. 291, and in Maine: *Stearns v. Burnham*, 5 Greenl. 261, that an indorsee, upon a note indorsed by the executor of a will proved in another state, can not maintain an action in those states. In the former case the note had long been due, before it was indorsed, and therefore the defendant had a right to make any equitable defense against the promisee, which was one ground relied on. In the case in Maine, the date of the note is not given, and, therefore, it does not appear whether it was overdue or not, when it was indorsed. But the facts are said to be exactly similar to those in the New Hampshire case. One of the leading arguments in the case from Maine was, that if the indorsee were allowed to sue in his own name it prevented the setting off of demands against the testator, and displaced equities. Now it is manifest that if the note was not due, when it was indorsed, and was rightfully indorsed by one having authority, then the promisor could have no set-off against the promisee, nor other defense founded on equities against him. We think, therefore, that this must have been a case where the note was overdue when indorsed.

"It can not, however, be denied that in these cases the reasoning of the court goes somewhat farther than the case of a note over due. The main argument is that if the indorsee of such an executor could bring an action, such an executor would give to another a power which he does not himself possess; that is, of successfully suing for and recovering a note in our courts. But this reasoning seems not quite satisfactory. A person in many cases, by the execution of his power, may give a title, on which title another can maintain an action, though he could maintain none himself. In the very case of an administrator, the ordinary by a grant of administration, enables the administrator to maintain actions which he could not maintain. An executor under a power to sell real estate, confers on his vendee a title and

a power to bring actions which he could not bring. So an administrator under our statute, who sells real estate under a license. The only question which would arise is this: Which administrator, where there is an administration in several states, has a right to indorse, and must the indorsement be made by an executor or administrator appointed and authorized in the state where the debtor dwells? If the latter be held, as seems to be implied in the cases cited, what is an indorsee to do, who holds a note, with a promisor and several indorsers living in different states? Must it be indorsed by one so as to give a right of action against each indorser? If the latter be the rule, then it would follow that the different administrators in different states might indorse to different persons, and one indorsee would have a right of action against one party, and another against another, on the same note. Such a rule would seem to be attended with great perplexities. If it once be held that a note may be indorsed, it would seem to follow that upon a valid indorsement the indorsee becomes the legal proprietor and holder to all purposes, with a right, as holder, to proceed against any party, in any state, as he might upon any other good, legal cause of action, in his own right; and that any administrator duly appointed, especially the administrator appointed in the state of the intestate's domicile, and having the custody of the note, and the executor named in the will, after probate, having the lawful possession and custody of the note, not yet due, may indorse and deliver it over, and will therefore become accountable for the value as assets, and that the indorsee will be the lawful holder of the note."

GORHAM v. CANTON.

[5 GREENLEAF, 206.]

UPON A QUESTION OF DOMICILE, the declarations of the party whose home is in controversy, made at the time of his going or returning, may be received as evidence of his intention.

THE question in this case involved the place of Enoch Waite's domicile. He resided with Dr. Holland at Canton from 1821 to 1825, except when absent on journeys and excursions, which was about one third of that time. To show the character of the residence, the defendants offered evidence of Waite's declarations, he being dead, made at different times, showing a design to remove. The evidence was admitted, as also were declarations by Waite, when absent on one of his travels, that he was going home to Dr. Holland's. The defendants objected to this last testimony. Verdict for the plaintiffs. The question of the admissibility of the testimony was reserved.

Fessenden and Deblois, for the defendants. The declarations made while going were admissible as explaining the act he was then performing; but that the place to which he was going was his home, was an independent fact, concerning which his declarations could not be considered part of the *res gesta*, but stood on

the ground of any other hearsay evidence: *Rex v. Chadderton*, 2 East, 27; *Rex v. Ferrybryston*, Id. 54; *Rex v. Eriswell*, 3 T. B. 707; *Rex v. Abergwilly*, 2 East, 63; *Rex v. Nuneham Courtney*, 1 Id. 373; *Rex v. Erith*, 8 Id. 539; 1 Phil. Ev. 196; Swift's Ev. 123.

Adams, contra, relied upon Vattel, b. 1, c. 19, sec. 218; *West Cambridge v. Lexington*, 2 Pick. 536 [11 Am. Dec. 231].

By Court, WESTON, J. We are of opinion that the testimony objected to was properly admitted. It was a part of the *res gesta*. The pauper, being at Talmouth, was setting out from there to go to some other place. He declares where and for what purpose. His intention can be known only to himself, except so far as it is communicated by his declarations; and these declarations are legal evidence of his intention. Where it is necessary to show the nature of an act, or the intention with which it is done, proof of what was said by the party, at the time of doing the act, is admissible: 1 Phil. Ev. 218. Thus, under the bankrupt system, the declarations of a trader, at the time of his absenting himself from home, are received in evidence to show the motives of his absence. Had the pauper declared that he was going to consult Dr. Holland, as a physician, to adjust accounts between them, to procure the clothes he had left at his house, or for any special purpose, proof of such declarations would have been admissible. Of the same character, in principle, is his statement, that he is going to Dr. Holland's, because that is his home. Such declarations show the intention with which the act is done. A man without a family or house of his own, leaves the place where he has resided and had his home, and it becomes important to ascertain for what purpose; whether his absence is intended to be temporary or permanent; what he said at setting out, or on the way, upon this point, is evidence of his intention, and has often been received on questions of domicile.

Judgment on the verdict.

Cited in *Ennis v. Smith*, 14 How. (U. S.) 422, upon the admissibility of declarations as to domicile of one whose domicile is disputed.

DODGE v. BARTOL.

[5 GREENLEAF, 286.]

CONTRIBUTION FOR THE JETTISON of goods laden on deck can not be enforced from the owner of the vessel.

CASE against the owners of the schooner Charles, for not delivering one hundred and sixty barrels of flour shipped at Georgetown for Portsmouth, for which the master signed bills of lading in the usual form, and with the usual saving of the dangers of the sea. Twenty barrels were shipped to go under deck and the remainder to be laden on deck at half freight. In consequence of striking on a reef on Nantucket shoal during a heavy storm, all the flour on deck and in the hold was thrown overboard, by means of which the vessel and the lives of the crew were saved. The value of the flour under deck was settled for general average. The defendants insisted that by the law merchant and by usage in America, they were not liable. To prove the usage two merchants, among others, were called, who had been insurers on the vessel, but the policy had expired. They were admitted, being objected to. Verdict directed for the plaintiff, subject to the opinion of the court. The jury were also instructed to consider and answer whether there was a general usage for coasting vessels to carry deck loads, when occasion offered, if not too deeply laden, and no objection made; and whether there was such a general usage among merchants and shippers, that the owner of a deck load can not maintain an action against owners and freighters, for their proportion of the loss occasioned by throwing it overboard for the preservation of the vessel and cargo, such usage being so generally established among merchants as to have the force of law. Both these questions were answered in the affirmative. The plaintiff objected that evidence of a negative usage ought not to have been admitted.

Greenleaf, for the defendants, contended that they were not liable to contribution for the jettison of goods laden on deck: *Stevens on Average*, 14; *Commercial Code of France*, v. 2, art. 421; *Pothier on Mar. Cont.* 67, sec. 118; *Ord. de la Marine*, art. 13, *Dujet*; *Jacobson's Sea Laws*, 234; *Consulat. cap.* 183; *Smith v. Wright*, 1 Cai. 43 [2 Am. Dec. 162]; *Lenox v. United Ins. Co.*, 3 Johns. Cas. 178; *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429; *Phillips on Ins.* 333; 2 *Dane's Abr.* 327.

Longfellow, contra, cited *Ord. de la Marine*, art. 12, 14; *Phillips on Ins.* 332.

By Court, WESTON, J. The claim of the plaintiffs against the defendants, as general owners, must be predicated upon one of two grounds; that fault or negligence, in the discharge of his duties, is imputable to the master; or that they are liable upon the principles of contribution, or general average. It is in evidence that the jettison, by which the plaintiff's loss was occasioned, was justified by the highest necessity; nor is it pretended that the property could have been preserved by any exertion on the part of the master or mariners.

On the question of contribution, the commercial code of France provides that the effects laden on the deck of the vessel, contribute if saved. If they be thrown overboard, or damaged by the jettison, the owner is not admitted to make a demand of contribution; his only remedy is against the master. By the ordinance of the marine, no contribution can be demanded for goods on deck, which have been thrown overboard or damaged; saving to the owners their remedy against the master. It would seem, from these authorities, that the shipper might look to the master for his indemnity; and if so, the owner might also be holden as liable for his default. Pothier, in his treatise on Maritime Contracts, art. 2, sec. 118, explains the reason of this, which is, he says, because it is the master's fault to overload the ship, if there was no room below deck for the goods; or if there was, it was his fault that he did not stow them there. In the present case, there was no such fault in the master of which the shipper has any right to complain. His goods were laden on deck by his express permission and assent, and he paid but half freight therefor. Valin, in his commentary on the ordinance, says, this rule does not apply to boats and small vessels which sail from port to port, where it is customary to load goods on deck as well as in the hold. Admitting this exception of Valin to be the law of this country, we do not perceive that it can fairly be applied to the case under consideration. Boats and small vessels are classed together; and by the latter we think ought to be understood such as ply from one port to the next adjoining port, or for short distances along the coast. We can not find that the exception of Valin has been adopted in this country; and if it is to be considered as qualifying the law here, it can not extend to vessels like the one in question; nor to voyages of the magnitude and importance of that in which she was employed by the plaintiff.

The general law that jettison from the deck presents no case for contribution, has been recognized in New York and in

Massachusetts. There can, we think, be little doubt, that in the excepted cases stated by Valin, depending on a usage to load on deck as well as in the hold, full freight was paid for the whole goods. Indeed, from the limited nature of the navigation, those laden on deck might be nearly or quite as safe as those laden in the hold; and this may have constituted the principal reason for the exception. But in the case before us, goods on deck would be as much exposed as in a foreign voyage. He knows the increased hazard, and he deliberately assumes it. If he be entitled to contribution, and if his case be within the exception of Valin, he would lose no more by the jettison than those whose goods are in the hold; although the latter pay twice as much for their carriage. If the owner of the vessel alone contributes, for which no usage, exception, or authority has been cited, there seems to be no reason why he should not have full freight for this increased hazard. The half freight stipulated by the shipper strongly indicates that this was and ought to be regarded as a case within the general law.

Placing our opinion upon this ground, we do not consider that the particular usage of the port of Portland, proved at the trial in accordance with this principle, can affect the case. It did not require this support; and the decision must have been the same if it had not been adduced. The determination, therefore, of the question as to the competency of the witnesses objected to, becomes unnecessary. But as by law the owners are not liable, for the same reason the insurers are not, and thus they are competent witnesses, although their testimony has no influence in the decision of the cause.

By the general maritime law this is not a case for contribution. If this is by usage an excepted case, the burden of proof is upon the plaintiff to show it. The defendants are not bound, nor is it necessary for them to prove a usage corresponding with the law. Phillips, in his *Treatise on Insurance*, p. 333, commenting upon the exception of Valin to the rule stated in the thirteenth article of the Ordinance, says, upon the principle of this exception, if it be the usage of the trade to carry part of the cargo on deck, a jettison therefrom is the subject of contribution. But he cites no authority which supports this position to the extent named. In the whaling voyages, he adds, it is the practice "to adjust upon the principle of general average oil thrown overboard from the deck, where it is carried for a short time, after being put in casks, before it can properly and safely be stowed in the hold." This usage and

practice in regard to these voyages arises from the particular nature of the business; and as it applies to every part of the cargo, which must all undergo the same process, it is equal in its application. It does not extend to goods carried on deck for the voyage; but to such as are to be carried below deck in their transit to their destination in the hold. If, by the usage, the goods are to be carried on deck for the voyage, this exception, even according to Phillips, does not uniformly apply, for he states, in the same paragraph, that it is usual to carry on deck a part of the cargo of a vessel loaded with lumber, but that it does not appear to be the practice to contribute for this part of the cargo if it be thrown overboard.

New trial granted.

Cited in *The Rebecca*, 1 Ware, 211; *The Paragon*, Id. 326; *Lawrence v. Minturn*, 17 How. (U. S.) 114; and in *The Delaware*, 14 Wall. 604, in support of the statement that the carrier is not liable for the jettison of goods stowed on deck, unless they were so stowed without the consent of the owner, or pursuant to a general custom binding him, and that then he would be chargeable with the loss.

HOLBROOK v. BAKER.

[5 GREENLEAF, 309.]

MORTGAGOR'S POSSESSION OF PERSONAL PROPERTY mortgaged is not inconsistent with the mortgage, and is not conclusive evidence of fraud.

CHATTEL MORTGAGE TO SECURE FUTURE ADVANCES is not invalid as to creditors, there being no suggestions of unfairness or trust between the parties.

THE RIGHT TO REDEEM A CHATTEL mortgaged can not be seized on attachment or execution by the creditors of the mortgagor.

REPLEVIN for a clock. The defendant, a constable, pleaded that the property was in one Peachy, which was traversed. He had attached the clock for a debt due to one Wilson. The plaintiff claimed under a bill of sale made after Wilson's debt accrued, by which Peachy conveyed the clock to him in mortgage to secure the sum of fourteen dollars then due, and such further sum as might be due to him at the end of sixty days, within which time it might be redeemed by the mortgagor. The clock was attached before the expiration of the sixty days. The clock was screwed to the wall of Peachy's house, and was allowed to remain in his possession, though he made a formal delivery of it, pointing to it, saying that it was plaintiff's property. At the time the clock was taken by the defendant he was notified that it was mortgaged to the plaintiff.

The defendant contended that the sale was a fraud as to creditors. The evidence was submitted to the jury under the instruction that if they were of opinion that the conveyance was without consideration and fraudulent, to find for the defendant; but if they were of opinion that it was made for a valuable consideration, and was fair and honest, to find for the plaintiff.

Verdict for the plaintiff, subject to the opinion of the court upon the correctness of the instructions given.

Davis and Morgan, for the defendant, contended that the sale was fraudulent and void against creditors, because the debt then due was not canceled, and there was therefore no consideration, and that a change of possession was indispensable to the validity of the mortgage: *Roberts' Fraud. Conv.* 555; *Portland Bank v. Stubbs*, 6 Mass. 422 [4 Am. Dec. 151]; *Jewett v. Warren*, 12 Id. 300 [7 Am. Dec. 74]; *Gale v. Ward*, 14 Id. 352 [7 Am. Dec. 223]; *Tucker v. Buffington*, 15 Id. 477; *Stone v. Grubham*, 2 Bulstr. 225; *Cadogan v. Kennett*, Cowp. 434; *Edwards v. Harben*, 2 T. R. 587; *Reed v. Blades*, 5 Taun. 212; *Doe v. Manning*, 9 East, 59; *Sturtevant v. Ballard*, 9 Johns. 337 [6 Am. Dec. 281]; *Hamilton v. Russell*, 1 Cranch, 97.

Fessenden and Deblois, contra.

By Court, MELLER, C. J. The jury have, by their verdict, settled the question as to the alleged fraud in the conveyance of the clock; and we are, therefore, to consider it as having been made fairly and honestly, for the purposes avowed and expressed at the time; and the only inquiries are whether the facts relating to the possession of the clock, and the nature of the mortgage of it, furnish any objections to its validity and intended effect. It has been contended that the mortgage was void as against creditors, because Peachy remained in possession of the clock. Still a formal delivery was made, and by agreement of the parties, it was suffered to continue in its usual place in Peachy's house. Now it has always been held in Massachusetts and this state, that the possession of the vendor after sale is only evidence of fraud; but is not such a circumstance as *per se* necessarily invalidates the sale. This is the principle in the case of an absolute conveyance; and surely a more rigid one ought not to be applied to the case of a mortgage of a chattel. This case is not unlike that of *Atkinson v. Maling*, 2 T. R. 462, and *Haskell v. Greeley*, 3 Greenl. 425. But this has ceased to be a point of any importance in the case, inasmuch as the mortgage, notwithstanding the possession,

remained with Peachy, was an honest and *bona fide* transaction.

Another circumstance relied on by way of objection is, that the mortgage was made to secure, not only the fourteen dollars then due from Peachy to Holbrook, but certain future advances. In answer to this point also, we may refer to the above-mentioned case of *Atkinson v. Maling*, and *Badlam v. Tucker et al.*, 1 Pick. 389 [11 Am. Dec. 202]. The verdict puts a negative upon all suggestions of any unfairness or trust between the parties. Besides, the report states that at the time of the attachment, the mortgage, and its object, were distinctly made known to the defendant. Another objection to the defense is, that the attachment was made before the sixty days had expired; and while only a right of redemption existed in Peachy; the legal property then being in the plaintiff. We know of no law which authorizes a creditor to attach or seize on execution a right to redeem a chattel. Our statute relates only to rights of redeeming real estate. This is one of the grounds of the opinion of the court in the before cited case of *Badlam v. Tucker et al.*, and the principle is there distinctly laid down as clear and undisputed, at least in those cases where the money due to the mortgagee has not been paid or tendered to him. In every view of the cause we think the instructions of the judge were correct; and there must be judgment on the verdict.

In *Almy v. Wilbur*, 2 Woodb. & M. 387, it is said, referring to the principal case, among others, that the better doctrine seemed to be that at common law, in case of mortgage of personal property, if possession be not changed, it is not even *prima facie* evidence of the fraud.

RETENTION OF POSSESSION EVIDENCE OF FRAUD.—See *Babb v. Cleason*, 13 Am. Dec. 684, and note containing references to other decisions in this series upon this question.

VALIDITY OF MORTGAGES FOR FUTURE ADVANCES: See *Badlam v. Tucker*, 11 Am. Dec. 203, and note; and *Pettibone v. Griswold*, 10 Id. 106, and note.

WEBSTER v. DRINKWATER.

[5 GREENLEAF, 319.]

ONE MAY WAIVE THE TORT and sue on the implied contract only in those cases where the defendant has derived some benefit from the tort.

AN AGENT OF THE GOVERNMENT, appointed to superintend the execution of a contract with the United States, but not to make a contract with any one, is not personally liable for demanding, through a misconstruction of its terms, more than the contract calls for.

ASSUMPSIT for services performed and moneys expended. One Isley, collector of the customs at Portland, being duly authorized so to do, made a contract with the plaintiffs, Webster and others, for the building of two revenue cutters to the satisfaction of the collector, or of such person as he should appoint. The collector agreed to pay a specified sum, upon the production by the plaintiffs of a certificate of the person appointed, of the completion of the cutters, according to the terms of the agreement. The contract called for certain dimensions, and was particular as to style of finish, etc. The defendant was appointed superintendent, and gave the plaintiffs the certificate on the completion of the boats. Certain extras were also allowed and paid. At the time of the settlement, the plaintiffs stated that they had made a bad bargain, and that the defendant had required more work of them than the contract called for, and that they would petition congress for an allowance. The petition was presented, but was rejected. This action was then commenced. The labor and materials forming the subject-matter of the suit, were proved to have been furnished at the request and under the direction of the defendant, in his capacity of agent of the United States, he insisting and the plaintiffs denying that they came within the meaning of the contract.

The chief justice left it to the jury to determine whether any work had been done, or expenses incurred not required by the terms of the contract, and, if so, whether it was done and incurred under an engagement, express or implied, on the defendant's part, to pay for the same. The jury found for the defendant, certifying, moreover, that some extra work had been done, and expenses incurred by the plaintiffs, respecting which the defendant assumed to act as the agent of the United States without authority, by contending that such work was within the terms of the contract, but which was not so considered by the jury. The question presented by the plaintiffs, that, in consequence of this unlawful assumption, the law raised a promise on the part of the defendant to pay, was reserved.

Fessenden and Deblois, for the plaintiffs. An agent is estopped to deny that he made the contract for himself, where he had no power to stipulate for another: *Sumner v. Williams*, 8 Mass. 209 [5 Am. Dec. 83]; *Liverm. on Agents*, 2; *Paley on Agency*, 4; *Chitty on Contr.* 64; *Gill v. Brown*, 12 Johns. 385; *Freeman v. Otis*, 9 Mass. 273 [6 Am. Dec. 66]; *Swift v. Hopkins*, 13 Johns. 313. An injured party may waive a tort and proceed as on an implied assumpsit: *Hambly v. Trott*, Cowp. 372; *Clinton v.*

Strong, 9 Johns. 370; *Ripley v. Gelston*, Id. '201 [6 Am. Dec. 271]; *Lightly v. Clouston*, 1 Taun. 112; 5 East, 39, note; *Smith v. Hodgdon*, 4 T. R. 217; 2 Comy. on Contr. 29, 558; *Irving v. Wilson*, 4 T. R. 485.

Longfellow, contra.

By Court, MELLAN, C. J. The question reserved at the request of the plaintiffs is, whether the law implies a promise, on the part of the defendant, to pay for certain extra work by them done on the vessel, which the jury have found was beyond the terms of the contract, and such as the defendant, as agent, had no right to require. They have found that whatever he did in the premises was done by him, claiming to act as agent on the part of the United States, though as to such extra work he exceeded his powers in requiring it, and that he never made any engagement, express or implied, to pay for it. Still, it is contended by the counsel, that, in existing circumstances, the law raises a promise to pay this extra expense. It is a principle well settled that a promise is not implied against or without the consent of the person attempted to be charged by it: *Whiting v. Sullivan*, 7 Mass. 107. And where one is implied, it is because the party intended it should be, or because natural justice plainly requires it, in consideration of some benefit received.

The application of these principles is perfectly familiar in those cases where a man is professedly acting in his own behalf, and receives the benefit which is the consideration of promise implied. The point of inquiry is whether the law is the same when the man is acting in a certain transaction as an authorized superintendent, but in some particular in his demand exceeds his authority, and yet receives no advantage whatever from those services, for the payment of which it is contended the law raises a promise, as in the case under consideration.

The terms of the contract, the character in which the defendant was connected with and acted in the transaction we are examining, and, of course, the nature and extent of his authority were all equally well known to both parties. Both must have supposed that the defendant considered himself as requiring no more than he had a right to require, because, after some dispute, his requisitions were complied with. He was the person appointed, by consent of all concerned, to superintend the building of the vessel, and see that she should be built in all respects in conformity to the contract. It is not pretended that in the discharge of his duty, he did not act fairly and faithfully. On

the contrary, the proceedings of the plaintiffs, in applying to congress for some allowance, show that they did not rely on any engagement or liability on the part of the defendant. From these facts we do not perceive on what grounds a promise can be implied by law. The defendant was, in some respects, a judge in business of that kind, and was so considered; and surely his honest opinion and decision ought not to be considered as subjecting him to an action, as upon an implied promise, because he is found to have transcended his delegated authority in a particular instance. It has, however, been contended by the counsel for the plaintiffs, that if an agent, in making a contract, exceed his authority, he must be holden personally as to the amount of the excess; and several of the cases he has cited may be considered as supporting that position, where there is an express undertaking on the part of the agent, and the doctrine so limited is not contested by the defendant's counsel. But in the case before us, there was no express contract, nor even an implied one, on the part of the defendant, as the jury have found; and his character and duty as superintendent, taken in connection with the manner in which he performed that duty, precludes the idea of a promise implied by law, which could bind him. On what consideration should such a promise be implied? The defendant received no benefit from the services performed beyond the written contract, and the plaintiffs were not bound to perform them, and they never pretended that they were performed on the ground of even a supposed liability on his part. It is urged, however, that the defendant may be fairly held chargeable in this action, upon the well known principle that in many cases a man may, as it is expressed, waive a tort, and seek his remedy for damages occasioned by it, in an action of assumpsit. The general principle is not denied, nor the authority of the cases cited to this point; but their application to the case before us is denied on two grounds: First, because in all of them, except one, the sum sued for had been actually received by the defendant in money or in services, of which he had received the benefit; and in the excepted case, the officer received the tonnage duty without any authority of law, and in the same manner had accounted for it to government, an appropriation he had no right to make, and which sum the party suffering could not obtain from government by any legal process. The second reason is, that in the present case there has been no tort committed, and so none could be waived. The defendant has merely done what he sup-

posed and believed was his duty, pursuant to the contract, and in the due execution of the powers given him by the collector, and assented to by the plaintiffs. Again, it has been urged that a man can not be permitted to avail himself of his own wrong; this is a correct general principle; but, if he has violated his neighbor's property, or blasted his reputation, he surely may defend himself against that kind of action which the law does not permit to be sustained for redress of the particular injuries complained of.

The jury have negatived the promise alleged, and the facts, as reported, affording no ground on which the law will imply a promise, we will merely add that the defendant can not be adjudged answerable in this action. We have given an answer to each of the arguments which have been urged by the plaintiffs' counsel, though we might have omitted it, because some of them could have no bearing upon the facts before us; for it must be distinctly remembered that the defendant was never the agent, on the part of the United States, to make a contract with any one; but was merely constituted by the consent of the plaintiffs, as agent for the purpose of superintending the execution of a contract, which had been previously made between them and Mr. Collector Ilsley.

We are all of opinion that there must be.

Judgment on the verdict.

WAIVING TORT.—To enable the injured party to waive the tort committed and seek relief in an action of assumpsit for money had and received, it must, as a general rule, appear, as is stated in the principal case, that the sum sued for has been received by the defendant in money, or in services of which he has received the benefit. There is no doubt that a person may waive his right of action for the tort, and pursue his remedy for the breach of a supposed contract, where, as a result of the tortious act, the defendant has come into possession of money belonging to the plaintiff: *Glass Co. v. Wolcott*, 2 Allen, 227; *Boston and W. R. R. Co. v. Dana*, 1 Gray, 83; *White v. Brooks*, 43 N. H. 402; *Smith v. Smith*, Id. 536; *Shaw v. Coffin*, 58 Me. 254; *Howe v. Clancey*, 53 Id. 130; *Lord v. French*, 61 Id. 420; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Rand v. Nesmith*, 61 Me. 111; *Goodenow v. Snyder*, 3 Greene (Iowa) 599; *Fratt v. Clark*, 12 Cal. 89; *Halleck v. Mixer*, 16 Id. 574; *Crow v. Boyd*, 17 Ala. 51; *Pike v. Bright*, 29 Id. 332; *Staat v. Evans*, 35 Ill. 455.

Judge Redfield, delivering the opinion of the court in *Centre Turnpike Co. v. Smith*, 12 Vt. 212, 217, an action of assumpsit for the recovery of toll for passing a gate on the plaintiff's road, said: "In the present case, the defendant claimed the right to pass the gate without paying toll, on the ground of exemption or privilege, and on that claim he was permitted to pass. There was no express promise to pay, in any event, and will the law, under the state of facts here presented, imply a promise? If not, the plaintiff must fail in the present action. We know there are many cases in which a person is virtually made liable in assumpsit for a tort. But those cases may be re-

solved into classes, none of which include the present: 1. Where the defendant has taken personal property and converted it into money: *Gilmore v. Wilbur*, 12 Pick. 120; by Jackson, J., in *Cummings v. Noyes*, 10 Mass. 433; by Lord Mansfield, in *Hambly v. Trott*, Cowp. 373. But in these cases the chattels must have been actually converted into money. Such is the language of the books. I find but one case where chattels have been taken by force and not converted into money, that assumpsit has been sustained, and that case rests upon no very satisfactory basis: *Hill v. Davis*, 3 N. H. 386. 2. When the defendant obtains the goods surreptitiously under color of sale: Chitty on Contracts, 19; *Hill v. Prescott*, 3 Taun. 274; *Edmeads v. Newman*, 8 E. C. L. 116. In the latter case, the defendant came fairly by the bills, but fraudulently obtained the money upon them. The case of *Clarke v. Shee*, Cowp. 197, is of the same character. 3. Where one employs the apprentice of another, even when he did not know of the apprenticeship, he is liable, in assumpsit for work and labor: *Lightly v. Clouston*, 1 Taun. 112; *Bowes v. Tibbels*, 7 Greenl. 457; see, also, *Eades v. Vandeput*, 5 East, 39, which involves the same principle. 4. Where the defendant, under false color, has recovered the rent of plaintiff's estate: 2 Stark. Ev. (6 ed.) 64, and cases cited. So, also, where the defendant has intruded into plaintiff's office, and under color of right has received the fees: *Id.*" The court concluded that the action would not lie. Chief Justice Parker adds, in *Jones v. Hoar*, 5 Pick. 285, 290, that "No case can be shown where assumpsit as for goods sold lay in such case, except it be against the executor of the wrong-doer, the tort being extinguished by the death, and no other remedy but assumpsit against the executor remaining."

Many of the decisions following the doctrine of these cases explicitly assert that the tort can not be waived and assumpsit brought, unless the property has been sold or converted, and money or money's worth received by the defendant: *Pike v. Wright*, 29 Ala. 332; *Crow v. Boyd*, 17 Id. 51; *Glass Co. v. Wolcott*, 2 Allen, 227; *Mann v. Locke*, 11 N. H. 246, 248; *Smith v. Smith*, 43 Id. 536; *Stearns v. Dillingham*, 22 Vt. 624; *Randolph Iron Co. v. Elliott*, 34 N. J. L. (5 Vroom) 184; *Budd v. Hiler*, 27 Id. (3 Dutch.) 43; *Balch v. Patten*, 45 Me. 41; *Moses v. Arnold*, 43 Iowa, 187; *Hutton v. Wetherald*, 5 Harr. (Del.) 38; *Watson v. Stever*, 25 Mich. 386, where the authorities are collated: *Jones v. Hoar*, 5 Pick. 289. In *Pike v. Bright*, 29 Ala. 332, 336, it is said that the doctrine of waiving a tort and bringing assumpsit is confined to cases where the wrong-doer has disposed of the plaintiff's property, and has received either money or some other thing as money, and does not extend to cases of mere conversion or detention of the plaintiff's property without any sale of it. And in the same state the services of a slave wrongfully taken from the plaintiff by the defendant and detained by him, were not permitted to be recovered in an action of assumpsit: *Crow v. Boyd*, 17 Ala. 51. The doctrine was carried still further in *Fuller v. Duren*, 36 Id. 73, where property wrongfully taken was exchanged for another article which was not sold. The court denied the applicability of the principle of waiving the tort and suing in assumpsit, saying that it applied only where that which had been tortiously taken had been sold, and that an exchange and a sale were quite different. In an action of assumpsit against a deputy tax collector, the plaintiff's printers sought to recover the amount of their bill for printing tax lists at the defendant's request. The town had refused to pay the bills on the ground of want of authority in the defendant to contract for the publication. Upon an objection raised to the form of action, Walton, J., having stated that case for deceit was the proper action under the circumstances,

remarked: "But it is only in favor of the action for money had and received which has been likened in its spirit to a bill in equity, that the rule is relaxed that the evidence must correspond with the allegations and be confined to the matter in issue; and this relaxation, by which a party is allowed to aver a promise and recover for a tort, being a departure from principle and the correct rules of pleading, ought not to be extended to new cases."

Proceeding on this same theory, the decisions holding the strict rule in regard to the right to relief in an action on the implied contract, for a tort, maintain further, that in the action for money had and received, the plaintiff can recover only the amount which has been so received by the defendant. The suit is not regarded as brought to obtain the reasonable worth of the property tortiously disposed of. "The money received from its sale is the limitation of the plaintiff's right to recover, a limitation imposed on the plaintiff by the remedy adopted:" *Rand v. Nesmith*, 61 Me. 111, 114; and to the same effect, *Pearsoll v. Chapin*, 44 Pa. St. 9.

None of the authorities heretofore referred to recognize an injured party's right to waive the tort and sue in contract on a count for goods sold and delivered. The majority of the decisions expressly confine the right to the form of action for money had and received; as *Jones v. Hoar*, 5 Pick. 285, and the subsequent adjudications of *Allen v. Ford*, 19 Id. 218; *Brown v. Holbrook*, 4 Gray, 103; *Berkshire Glass Co. v. Wolcott*, 2 Allen, 228; *Bartlett v. Tucker*, 104 Mass. 345. The reason of this restriction may be either the reluctance to broaden what is regarded as an exception to the general rules of pleading and of evidence, or the fear that by permitting the plaintiff to declare as upon a sale, inconvenience would thereby result to the defendant. That the defendant is not prejudiced by waiving the tort and demanding of him, under the form of a proceeding *ex contractu*, what he has received, is repeatedly asserted as an important ground for entertaining the action for money had and received. The inconvenience that might follow to the tortious actor by the waiver of the wrong, and the raising the presumption of a sale, is thus pointed out by Lord Alvanley in *Bennett v. Francis*, 2 Bos. & P. 550, 555: "All that can be collected from the cases is this, that if the goods be converted into money, the court will allow the plaintiff to waive the tort, and bring an action in which he can recover nothing more than the sum actually received. But if it were competent to the plaintiff in a case like this to waive the tort and convert the transaction into a contract, it might involve the defendant in great difficulties. Goods are demanded of a person who claims them as his own, and insists on keeping them. Now, if the party demanding the goods be at liberty to convert this into a contract for goods sold and delivered, the consequence would be that on proving his property in the goods the other party would be obliged to pay the value of them, though possibly to his utter ruin; whereas, if the former had declared in trover nominal damages only would probably be given and the goods would be restored." But, if in an action in this form the defendant pays money into court, it will be treated as a consent on his part that the transaction be deemed a contract of sale: *Id.*; *Yate v. Williams*, 2 East, 128.

There is, notwithstanding, some authority for the position that the owner of chattels may waive the wrong committed in their removal and sue for their value as upon an implied contract of sale: *Halleck v. Mixer*, 16 Cal. 574; *Fratt v. Clark*, 12 Id. 89; *Berly v. Taylor*, 5 Hill, 583; *Barker v. Cory*, 15 Ohio, 9. Though it must be conceded that these decisions are opposed to the general current of the adjudications, cases may yet be found which maintain that assumpsit may be brought to recover the value of the use of the plaintiff's

property which the defendant has converted to his own benefit. For example, the plaintiff may waive the trespass and recover in assumpsit where the defendant's cows have been wrongfully pastured on the plaintiff's land: *Welch v. Bogg*, 12 Mich. 42; he may recover in an action on the implied contract for the value of the time of his negroes detained by the defendant, who had subsequently returned them: *Jones v. Buzzard*, 1 Hemp. 240; *Stockett v. Watkins, administrator*, 2 Gill & J. 326. The court were divided in *Ford v. Caldwell*, 3 Hill (S. C.) 248, three judges favoring and two doubting whether the value of the services of slaves tortiously seized by the defendant's intestate could be recovered in assumpsit against the administrators. It is apprehended, however, that this action could be supported on the authority of the Massachusetts cases, which though strictly insisting upon the general rule of the realizing of money by the defendant, yet recognise an exception for the sake of justice, where the action is against the personal representatives of a wrong-doer: *Jones v. Hoar*, 5 Pick. 285. The South Carolina courts, on the general question, no doubt follow the restricted rule of the Massachusetts and other decisions, for where watches wrongfully taken by the defendant had been destroyed by fire, the plaintiff's only remedy was pronounced to be in trespass or trover: *Schweizer v. Weiber*, 6 Richards, 159.

The question we are considering arose in a recent Wisconsin decision in the form of set-off: *Norden v. Jones*, 33 Wis. 600, 604. The action was on a book account, and the defendant endeavored to set off a charge for the pasture of the plaintiff's cattle. It appearing that the pasturing of the cattle by the plaintiff had been a trespass, the justice in the lower court denied the set-off, saying that the defendant must resort to his action of trespass to recover the damages occasioned by the pasturing. From this judgment an appeal was effected. The judgment was reversed after the following consideration of the subject by Chief Justice Dixon: "It is not to be denied that there are numerous decisions of most respectable courts sustaining this view [that of the lower court], while on the other hand there is an equal weight of most respectable authority also for holding that a promise to pay will be implied under such circumstances, upon which an action of assumpsit may likewise be maintained. The question being new in this court under our present statutes, we are at liberty to adopt such rule as in our judgment will best subserve the ends of justice, which is or ought to be the object of all rules laid down in the course of judicial proceedings. The cases of *Conklin v. Parsons*, 1 Chand. 240, and *Pierce v. Hoffman*, 4 Wis. 277, were controlled by the language of subdivision 3 of sec. 1, c. 94, R. S. 1849, then in force. That subdivision was omitted altogether in the present revision, thus making a material change in the law of set-off: R. S. 1858, c. 126, sec. 1; 2 Tay. Stats. 1448, sec. 1. The language of the court in *Conklin v. Parsons*, favors rather than disfavors the general right to waive the tort and sue in assumpsit for a mere conversion of property. And see *Keyes v. Railway Co.*, 25 Wis. 691.

"Mr. Nicholas Hill, in his note to the cases of *Putnam v. Wise*, 1 Hill, 240; and *Berly v. Taylor*, 5 Id. 584, has collected nearly all of the adjudications up to the time of publication, 1844, as well those which hold the narrower rule, which, in general, limits the right to waive the tort and sue in assumpsit to cases where goods have been taken from the plaintiff, and sold by the wrong-doer, and the money received by him, as those which establish a more liberal principle by declaring the right of the injured party to waive the tort and bring assumpsit in a variety of cases where the fruits of the trespass or wrong have not become or been turned into money or its equivalent

in the hands of the tortfeasor. Judge Redfield, in *Centre Turnpike Co. v. Smith*, 12 Vt. 217, resolves the cases coming within the narrower rule into four classes, to which the case of *Jones v. Hoar*, 5 Pick. 290, adds a fifth class not named by Judge Redfield. The underlying question in all the cases obviously is, when and under what circumstances will the law imply a promise on the part of the defendant to pay? 'It is a principle well settled,' say the court, in *Webster v. Drinkwater*, 5 Greenl. 322, 'that a promise is not implied against or without the consent of the person attempted to be charged by it. And where one is implied, it is because the party intended it should be, or because natural justice plainly requires it, in consideration of some benefit received.' Tested by the latter as the governing principle upon which the law raises a promise to pay, it is very obvious that the more liberal rule is the correct one, and that which should prevail.

"And such is the rule for which Mr. Hill contends, of whose great ability and acknowledged attainments in his profession it is unnecessary for us here to speak. It will be conceded by all that his opinion is entitled to very great weight, sustained as he is by the language of the court in the two cases to which his notes are appended, as well by other decisions to which he refers, and especially those in New Hampshire and Maryland: *Hill v. Davis*, 3 N.H. 384; *Stockett v. Watkins*, 2 Gill & J. 326, 342, 343. We give the concluding portion or paragraph of his note to the first case, with his citations as they appear in the volume above referred to. He says: 'The above cases from the Maryland and New Hampshire reports are sustained by the dicta of Jackson, J., in a Massachusetts case decided sometime previous to *Jones v. Hoar*, 5 Pick. 285; *Cummings v. Noyes*, 10 Mass. 433, 435, 436. And see the observations of Madison, senator, in *Butts v. Collins*, 13 Wend. 153, 154; also, *Ford v. Caldwell*, 3 Hill (S. C.) 248, especially the opinion of Richardson, J., 250. They seem also in accordance with the principle of several English decisions that the tortfeasor shall not be allowed under such circumstances to set up his own wrongful intent in disavowal of the implied promise which the law would otherwise raise against him: *Chitty on Cont.* 6; *Hill v. Perrott*, 3 Taun. 274, 275, *per curiam*; *Lightly v. Clouston*, 1 Id. 112, 114, *per Mansfield*, C. J.; 1 Leigh's N. P. 4, 5; *per Maison*, senator, in *Butts v. Collins*, 13 Wend. 154, 155. Apart from all reasoning of a technical or artificial character, and looking to the substantial ends of justice, it is quite difficult to see why this principle should not be applied in cases like *Jones v. Hoar*, *supra*, and *Willett v. Willett*, 3 Watts, 287. In neither could the defendant have been prejudiced by allowing the plaintiff to sue in *assumpsit*. On the contrary, the practice generally operates to favor the defendant, as the plaintiff thereby foregoes his right to damages for the tort as such, and restricts himself to the simple value of the property: See, *per Lord Mansfield*, in *Lindon v. Hooper*, 1 Cowp. 419; *per Bayley*, J., in *Foster v. Stewart*, 3 Mau. & Sel. 201, 202; *per Maison*, senator, in *Butts v. Collins*, 13 Wend. 156. The defendant, moreover, gets the right of set-off, which would be precluded by denying the plaintiff his election: *Per Heath*, S., in *Lightly v. Clouston*, 1 Taun. 114, 115. Nor would the defendant be likely to suffer embarrassment by the form of pleading: *Per Lord Mansfield*, in *Lindon v. Hooper*, 1 Cowp. 414, 419. And clearly he could not be said to incur any hazard from a second action in tort for the same matter: See 1 Phil. Ev. 333, 7 ed.; *Rice v. King*, 7 Johns. 20; *McLean v. Hugaren*, 13 Id. 184.'

"And in his remarks upon the second case, 5 Hill, 584, he says that 'the observations of the judges in *Young v. Marshall*, 8 Bing. 43 (21 E. C. L. 215), are worthy of attention as illustrating the principle on which the English

doctrine rests.' The action was for money had and received, and was brought by the assignee of a bankrupt against the sheriff, on the ground that he had wrongfully sold goods belonging to the plaintiff on a *fi. fa.*; and it was objected that the action should have been trover, especially as the money had been paid over to the execution-creditor before suit commenced. The court, however, overruled the objection, holding that the plaintiff might, but was not bound to go for the tort. Tindal, C. J., there stated the rule to be that 'no party is bound to sue in tort, when by converting the action into an action on contract he does not prejudice the defendant; and, generally speaking, it is more favorable to the defendant that he should be sued in contract, because that form of action lets in a set-off, and enables him to pay money into court.' Bosanquet, J., denied that the plaintiff who brings assumpsit in such case thereby affirms the acts of the sheriff, 'he merely waives his claim to damages for a wrong, and seeks to recover only the proceeds of the sale.'

"And still another most material advantage which the wrong-doer derives from the waiver of the tort and suit in contract in this state, is freedom from arrest and imprisonment, to which he would otherwise be liable and be subjected. We conclude, therefore, that the doctrine of the authorities above quoted, and for which Mr. Hill contends, is the better one, and must accordingly hold that the justice was in error when he excluded the evidence offered by the defendant in support of the item in his counter-claim against the plaintiff for the pasturage of the plaintiff's cattle."

THE DOCTRINE IS ALSO APPLIED TO THEFTS.—Where articles are stolen and converted into money, assumpsit will lie against the thief: *Howe v. Olancey*, 53 Me. 130; *Boston R. R. Co. v. Dana*, 1 Gray, 83. And in the former citation, it is said when the articles are not converted into money it may be that the remedy is by an action of trespass or case instead of by an action by assumpsit.

MERGER OF CIVIL INJURY IN PUBLIC OFFENSE.—This subject is discussed in the note to *Foster v. Tucker*, 14 Am. Dec. 243.

WHETHER AN INFANT'S TORT COULD BE WAIVED and assumpsit brought, is a question that seems to be settled in the affirmative: Cases cited below. Some objection was raised on the ground that infants could not be made liable on their contracts in this manner, but this objection was disposed of in *Elwell v. Martin*, 32 Vt. 217. "Is an infant liable on assumpsit for money stolen, or for the proceeds of stolen property when converted into money? The thief of full age is so liable. The owner of property stolen and converted into money by the thief may maintain assumpsit against him for money had and received: *Howe v. Olancey*, 53 Me. 130; *Boston & W. R. R. Co. v. Dana*, 1 Gray, 83. The reasons upon which these decisions rest apply equally to the minor as to the adult. If the minor is liable for his torts, it is immaterial to him in what form of action recompense is sought. If for the purposes of justice the tort may be waived in the case of the adult and assumpsit maintained, it can, to accomplish the same great purpose, be equally well waived as to the minor:" *Shaw v. Coffin*, 58 Me. 254. And this is the law as announced in *Walker v. Davis*, 1 Gray, 506, where the infant had fraudulently obtained possession of the plaintiff's cow, and had sold her: *Towne v. Willey*, 23 Vt. 359; *Elwell v. Martin*, 32 Id. 217, where the question is met, is an infant liable in an action for money had and received for having taken from the plaintiff, tortiously and without his consent, a sum of money, and is answered in the affirmative after careful deliberation.

GARDINER MANUFACTURING CO. v. HEALD.

[5 GREENLEAF, 381.]

A WRITTEN INSTRUMENT, purporting to be a deed of partition and signed by the parties, but not sealed, is not so far a nullity as to admit parol evidence to contradict it.

A VERBAL SALE OF STANDING TREES is not binding on a subsequent purchaser without notice.

ONE TENANT IN COMMON OF PERSONALTY may sue in assumpsit his co-tenant who has sold the common property and received all the money.

EXECUTION AGAINST AN ABSENT DEFENDANT sued out without filing the bond, as required by statute, can not be avoided collaterally.

ASSUMPSIT for money had and received. Bangs, Hunter, and others, being tenants in common of a certain tract of land, the plaintiffs attached Bangs's interest in September, 1824, and recovered judgment in August, 1825. In the following winter the defendant entered upon the premises, pursuant to notice to the plaintiffs that he was a tenant in common of the whole tract, and cut and carried away a large quantity of timber. To recover their proportion the plaintiffs brought this action. The defendant gave in evidence a writing purporting to be a deed of partition signed by the tenants in common, but not sealed, and dated in January, 1824. Bangs's signature was affixed by Smiley as attorney; but the latter's authority was not under seal. By this instrument one lot was set off to Bangs, who released his right to the remainder. A witness was introduced who testified that the deed of division was the result of a verbal agreement between the parties, and was intended to apply to the standing trees only, for which alone the land was valuable, and that Bangs, pursuant to the agreement, had cut and taken trees on his lot. The plaintiffs had no notice of this partition until after their attachment. The evidence was admitted over plaintiffs' objection and the whole case reserved. An objection was also taken to the execution issued under the judgment, it appearing that Bangs was absent and that no bond had been filed pursuant to the statute. The objection was overruled. Verdict for the defendant.

Allen, for the plaintiffs. The action is rightly conceived: *Brigham v. Eveleth*, 9 Mass. 538; *Smith v. Barrow*, 2 T. R. 476; 1 Chitty's Pl. 26, 27; Willes, 209; Cowp. 419; 8 T. R. 146; 6 Id. 695. The instrument of January, 1824, was inoperative; being neither a deed nor recorded. Smiley had no authority to sign Bangs's name: *Porter v. Hill*, 9 Mass. 34 [6 Am. Dec.

22]; *Porter v. Perkins*, 5 Id. 233 [4 Am. Dec. 52]; *Perkins v. Pitts*, 11 Id. 125; *Stetson v. Patten*, 2 Greenl. 358 [11 Am. Dec. 111]; *Milliken v. Coombs*, 1 Id. 343 [10 Am. Dec. 70]; *Shep. Touch.* 56. The writing, however, such as it was, contained the whole previous oral agreement of the parties, and parol evidence thereof was inadmissible: *Brigham v. Rogers*, 17 Mass. 571; *King v. King*, 7 Id. 496; *Richards v. Killam*, 10 Id. 239.

Boutelle, contra. The action being in its nature equitable, parol testimony was admissible to reform the writing and correct a plain mistake: 3 Stark. Ev. 1018, 1019, 1027, n. 1; 1 Dane's Abr. 248, 249. The deed being a mere nullity, parol testimony is to be received as the only evidence of the facts: *Johnson v. Johnson*, 11 Mass. 359. The parol agreement for the sale of growing trees is not within the statute of frauds: 1 Ld. Raym. 182; 11 East, 362; *Bostwick v. Leach*, 3 Day, 476; 2 Stark. Ev. 599; 1 Dane's Abr. 650; and if it were, it was taken out by part execution: *Winter v. Brockwell*, 8 East, 308; *Davenport v. Mason*, 15 Mass. 85, 92; *Ricker v. Kelly*, 1 Greenl. 117 [10 Am. Dec. 38]; *Tucker v. Bass*, 5 Mass. 164.

By Court, WESTON, J. It has not been contended in argument, nor is it true in fact, that any legal partition of the land from which the timber in question was cut, has been made, so as to convert the estate in common, which Solomon Bangs held, into an estate in severalty. The parties in interest could make such partition between themselves, only by deed. The instrument, which purports to be a partition, closes with the words "in witness whereof, we, the said Bangs & Co., have hereunto set our hands and seals;" but no seals were, in fact, affixed. And if there had been, David Smiley, who put the signature of Bangs thereto, as his attorney, was not authorized by deed so to do. When, therefore, the plaintiffs attached the interest of Bangs in the land, he held as tenant in common, and his estate duly passed, by the subsequent proceedings, to the plaintiffs.

The defendant insists that what he did was rightfully done, in pursuance of an agreement with Bangs, made prior to the attachment. The agreement was committed to writing, and was signed by the parties assenting. There had been a previous negotiation and treaty in relation to the subject; but the written instrument is the evidence of what was concluded. The parol testimony objected to went to change that which the parties had set forth in writing. By the latter, the land was to be divided, and the timber as a consequence of that division. By the

former, the timber alone was to be divided, and the land to be left undivided.

In the *Countess of Rutland's case*, 5 Co. 26, it was resolved that "it would be inconvenient that matters in writing made by advice, and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of parties, to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchaser, and all others in such cases, if such nude averment against matters in writing should be admitted." And there is no rule of evidence better established than that parol testimony can not be received to vary, alter or contradict that which is written. But it is contended, on the part of the counsel for the defendant, that as the written instrument can not, by law, operate a partition of the land, as its terms import, it may be rejected as a nullity; and then the parol testimony might be admissible. The rule of law which gives a preference to written evidence, and excludes parol when it comes in competition, is designed to elicit and establish truth. Where the law does not require written evidence, a parol agreement may be enforced. But when agreements are committed to writing, that alone is evidence of what the parties have agreed. And if, through defect of form, or by reason of some positive provision of law, it can not have the effect intended, it still remains the best evidence of the understanding of the parties. To suffer it to be controverted and changed by "slippery memory," would be an attempt to illustrate that which is more certain, by that which is less so; which is no less contrary to just principles of reasoning, than to law.

If there had been no written evidence in the case, and the parol agreement had been such as it appeared in the testimony, it might have amounted to a license to the defendant, or to a sale of the standing trees, for which it seems Bangs had an equivalent, which might perhaps have bound him, or those deriving title from him with notice. But it would be certainly opposed to the policy of the law in relation to real estate to give effect to such a sale against a purchaser, or an attaching creditor, without notice. In the case before us, the land was valuable principally for its timber; and there is much land of this description in this state. The timber is attached to the realty. It is part of the inheritance. To cut or destroy it, except in a few specified instances, is waste on the part of the tenants for life or years, for which they are answerable to him

who has the next estate of inheritance in remainder or reversion. What safety would there be in buying property of this description, if a party without notice might lose the principal value, and perhaps the sole object of his purchase, if any one might strip the land with impunity who could prove by parol that the vendor had previously sold the timber to him? It is not pretended that the plaintiffs had notice of any such agreement prior to their attachment, and they are under no obligation to fulfill any parol contract of their debtor, whatever might be said of a written one, in relation to the timber.

By the notice given by the defendant to the plaintiffs, he is protected from being held answerable to them as a trespasser, for penal damages under the statute to prevent tenants in common and others from committing waste; but if the plaintiffs have been injured, they are not without remedy. If they had an interest in the trees as a part of the realty when attached to the land, when severed therefrom their interest did not cease. If one man enter upon the land of another, and cut down his trees and sell them, the party injured may waive the trespass, ratify the sale and maintain assumpsit against the wrong-doer for the money. And we are satisfied from the authorities cited that one tenant in common of personal property, as the timber in question was after it was severed, may maintain assumpsit for his proportion against another who has sold the common property and received all the money.

In regard to the levy, we are of opinion that it must be deemed effectual in this action. A remedy for the irregularity stated, can not be applied in this collateral manner. It must be obtained by *audita querela*, or by motion to the court, by whom the judgment was rendered to set aside the execution.

Verdict set aside and the defendant defaulted.

WATERSTON v. GETCHELL.

[6 GREENLEAF, 435.]

A PURCHASER OF PERSONALTY WITH NOTICE that his vendor is not to have the title to the articles until the performance of certain conditions, acquires no title as against the person on whose behalf performance was to be made, he being the owner of the articles.

TRESPASS for taking and carrying away fifty pine mill logs. The defendant claimed to have purchased from one Robinson, who was to receive the logs as compensation for cutting and

hauling the timber on the plaintiffs' land to their mill. But the ownership of the logs was to remain in the plaintiffs until certain indebtedness of Robinson had been discharged, and all the term of the agreement relative to the cutting and hauling had been complied with. The defendant was aware of this understanding, but nevertheless took the logs, whose value is now sought to be recovered. The cause was submitted on a case stated, containing these facts.

Gilman, for the plaintiffs.

Allen, *contra*.

By Court, MELLAN, C. J. It appears that the logs in question were cut on the plaintiffs' land, and taken and carried away by the defendant. Of course he is responsible in damages, unless he acquired a title to them by his purchase of Robinson. Whether he did acquire one, as to all, or any part of the specified quantity, is the question to be decided, and the decision must depend on the construction of the special contract between Robinson and the plaintiffs.

As to the one fourth part of the logs mentioned in the agreement, there can be no doubt Robinson had nothing to do with them, but to haul and deliver them at a certain place, for the use of the plaintiffs; and he did so deliver them to their agent at the upper pond, at Old Town Falls. As to the remaining three fourths, he was, by the contract, to deliver them also to the plaintiffs, at a certain place, where they were to receive them, transport them to their own mills, and saw them; and within a reasonable time, deliver to Robinson three fourths of the boards made from them. This quantity of logs was also carried to the plaintiffs' mill by their agent, for the purpose of being there sawed. It was also expressly agreed by the plaintiffs and Robinson, that the ownership of all timber so cut, how or wherever situated, should be and continue in the hands of the plaintiffs, till all the conditions of the agreement should be complied with, and all moneys due to them and William Emerson should be paid; and it does not appear that such conditions have been complied with, or such sums paid. This provision in the contract was well known to the defendant, at the time he committed the alleged trespass. From these terms of the contract thus stated, it is evident that Robinson was not a part owner of the logs, nor an agent to sell them; they belonged to the plaintiffs, and he was to be compensated for his labor in cutting and hauling the logs, by a certain proportion of the boards to be made

from them. As to these, the plaintiffs had a reasonable time allowed, within which to deliver them; but to prevent all misapprehension, dispute or eventual loss, it was agreed that the ownership should continue in the plaintiffs, as before mentioned. Now, without deciding whether a purchaser of the logs from Robinson, without notice of the terms and condition of the agreement, could be protected, it is manifest that the defendant, having notice at the time, could gain no title, nor exercise any control or right over the property, beyond those which Robinson himself had and could exercise; and he had expressly bound himself to exercise none. We are of opinion that the action is well maintained, for the value of all the logs taken, and according to the agreement of the parties, a default must be entered, and judgment for the plaintiffs for one hundred and seven dollars

CONDITIONAL SALES—TITLE REMAINING IN VENDOR.—See *Barrett v. Pritchard*, 13 Am. Dec. 449, and note.

USHER v. HAZELTINE.

[5 GREENLEAF, 471.]

A CONVEYANCE FROM FATHER TO SON of the former's farm in consideration of the son's bond to support his father during life is good in the absence of actual fraud, the father retaining personal property to a greater amount than his debts; notwithstanding some of the personalty is exempt from execution, and that after his decease his estate becomes insolvent in consequence of the expenses of administration.

SUBSEQUENT CREDITOR, WHO IS.—A creditor who blends in one suit debts accruing before and after a conveyance alleged to be fraudulent, and who recovers a judgment for the whole demand, will be regarded as a subsequent creditor.

TRESPASS *quare clausum fregit*, in which both of the parties claimed the *locus in quo*. The opinion states the case. Verdict for the defendant, subject to the opinion of the court.

E. Shepley, for the plaintiff, cited *Drinkwater v. Drinkwater*, 4 Mass. 354, and *Doe v. Routledge*, Cowp. 705.

N. Emery, contra.

By Court, MELLAN, C. J. William Hazeltine, being seised of the premises in question, on the ninth of August, 1824, by his deed of that date, conveyed the same to the defendant, his son. The deed was recorded February 8, 1825. The plaintiff, in February, 1827, obtained judgment against the estate of William

Hazeltine, in the hands of his administrator. The execution issued on that judgment was duly extended upon the same premises in August, 1827, and the return was seasonably recorded. The conveyance from the intestate, William Hazeltine, and the registry of it, being some years prior to the levy, if it was good and effectual to pass the estate to the defendant, there must be judgment on the verdict; otherwise there must be a new trial granted. The case finds that William Hazeltine was an honest man, and, at the time of this conveyance to his son, was not involved in debt. There is no proof of any actual fraud in the conveyance, nor is it pretended that any such existed in respect to the transaction. But the counsel for the plaintiff has contended that the conveyance was merely a voluntarily one, made on a good, but not a valuable consideration, and therefore not valid as against prior creditors; and he has insisted that the plaintiff was a prior creditor. His argument is, that though there was no actual fraud, the peculiar circumstances of this case show that on legal principles the conveyance ought not to be sustained.

His first point is, that the plaintiff was a creditor at the time the deed was made. As to this, it appears that all his demands, on which he recovered his judgment against the estate of the intestate, except ten dollars and ninety-six cents, were charged prior to the date of the deed; and that the items composing the sum of ten dollars and ninety-six cents, were charged after its date. Now, according to the decision of this court, in the case of *Reed v. Woodman*, 4 Greenl. 400, which is not impeached or doubted, the plaintiff, "having taken his judgment for his whole demand, is to be regarded as a creditor subsequent to the conveyance" of the premises in dispute. It is said, however, that though the items composing the ten dollars and ninety-six cents, are charged after the date of the conveyance, there is no proof that the sums charged became due after that time; and that certainly the last item could not be, because charged after the death of the intestate; but laying this out of the case; we may and ought to presume that the other charges were made at the time the debts became due in the absence of all proof to the contrary. In this view the plaintiff was not a creditor at the time of the conveyance.

His second point is, that a voluntary conveyance ought to be deemed void as against even subsequent creditors, if the grantor was insolvent at the time; or, at least, that such a circumstance is a badge of fraud, that may lead to that conclusion, according

to the third point settled in *How v. Ward*, 4 Greenl. 195. Our reply to this objection is, that the jury have found no fraud in this case; and it is admitted that none influenced the parties to the conveyance in question. But, beyond this, can the position of the counsel be admitted, that a voluntary conveyance can be impeached by a subsequent creditor though the grantor was entirely free from debt, if he was not possessed of sufficient property to pay the expenses of settling his estate also after his death? We are not prepared to sanction such a principle; the consequences of its adoption would not only be extremely embarrassing, but in many instances would be productive of discord and confusion by the disturbance or destruction of family settlements made with the best of motives and by the best of men of independent fortunes. The most prudent and calculating man can not foresee what misfortunes may overtake him, or how soon he may be reduced from opulence to poverty and ruin, without the least fault or imprudence on his part. It is for the public good that parents should be permitted, when possessed of property that renders them able to make advances to their children to assist them in their business or settlement in the world, and not to the prejudice of any of their creditors, without exposing the property thus conveyed to the danger of being wrested from them, whereby they may be subjected to greater trials and misfortunes than they probably ever would have suffered, if they never had received the bounty and assistance of their parents in the manner above mentioned. Besides, who can foresee how much of his estate, in case of his death, may be absorbed in expenses of administration, or withdrawn from the control and enjoyment of his creditors, by those discretionary allowances which the judge of probate may decree to his widow out of the personal estate.

But in addition to these arguments *ab inconvenienti* which we have stated, we would observe that the cases cited do by no means sustain the principle assumed. In *Drinkwater v. Drinkwater*, the principal inquiry was, whether the defendant, as administrator, was entitled to contest the deed of the intestate on the ground of fraud; and as there was no personal estate left more than sufficient to pay all his debts and the charges of administration properly incurred, and as the defendant had no lien on the real estate for the costs of that suit, judgment was rendered against him. That decision does not touch the point under consideration. So in the case of *Doe v. Routledge*, the only points decided were that to make a voluntary settlement

void against a subsequent purchaser within the statute of 27 Eliz. it must be covinous and fraudulent, and not voluntary only; and that he who would set it aside must be a purchaser *bona fide*, and for valuable consideration. Lord Mansfield's expression: "There is no allegation that William Watson, the uncle, owed a farthing at the time, or left a single debt undischarged at his death," had no necessary connection with the point in judgment; it was strong language used to show Watson's perfect solvency. Neither does the case from Ambler aid the plaintiff, so far as to maintain the objection we are considering. In the case before us, the inventory of the personal estate, as appraised, amounts to the sum of four hundred and twenty-seven dollars and forty-six cents, and the amount of debts was only two hundred and thirteen dollars and some cents; and had not the judge of probate, in his discretion, allowed the widow two hundred dollars, there would have been more than sufficient personal estate to pay the debts of the deceased and the charges of administration; and yet the language of Lord Mansfield, in the case in Cowper, goes no further than to the "debts he owed at the time of his decease."

On view of all the facts before us, and the authorities applicable to the case, our united opinion is that the action can not be maintained; and there must be judgment on the verdict.

CASES
IN THE
HIGH COURT OF CHANCERY.
OF
MARYLAND.

GIBSON'S CASE.

[1 BLAND'S CH. 138.]

TRUSTEES AS MINISTERIAL OFFICERS OF COURT.—It has long been the practice in this state for the court of chancery to appoint trustees as its ministerial officers to carry into effect its decrees and orders, particularly in creditors' suits.

FUNCTIONS OF SUCH TRUSTEES are, in some respects, strictly analogous to those of the executive officers of courts of law, and are somewhat, though not entirely, similar to those of masters in chancery in England.

WOMEN MAY BE APPOINTED as executive trustees of the court, where it will promote the interests of all concerned; as where a committee is selected to take charge of the person of a female lunatic, or of a lunatic husband, father, etc.

OFFICERS WHOSE DUTIES ARE INCOMPATIBLE with the duties of trustees, such as a register, clerk, or judge of a court, can not be employed as trustees.

INFANTS AND FEMES-COVERTS, being incompetent to contract, can not act as trustees for the sale or disposition of property where security is required to be given.

TRUSTEE MUST BE A CITIZEN AND RESIDENT within the jurisdiction of the court, so as to be continually under its control, and to be the better able to discharge the trust; hence, no person can act as such who is in a position subjecting him to the necessity of occasional absence from the state for long intervals.

COURT MAY DISPLACE A TRUSTEE where he removes from the state, or neglects his duty, or is guilty of injurious or improper conduct.

COURT EXERCISES A SOUND DISCRETION in selecting trustees, paying due regard to the recommendations of the parties.

PLAINTIFF'S SOLICITOR is usually appointed where the parties are silent.

PLURALITY OF TRUSTEES ARE NEVER APPOINTED, except on special application.

TRUSTEE HAS A LARGER DISCRETION IN MAKING SALES of property, as to the terms and mode of sale, than is allowed to a master in chancery in England.

TRUSTEE CAN NOT, OF HIMSELF, DO ANY ACT not specified in the order or decree, but which is usually required of such trustees in similar cases; thus, in a creditor's suit, the trustee can not, without being so directed in the decree, give notice to creditors to file vouchers of their claims by a specified day.

OFFICERS' FEES AT COMMON LAW.—Public officers were not permitted at common law to take any fees, except such as were expressly allowed them.

COMMISSIONS OR POUNDAGE FEES ARE ALLOWED TRUSTEES in making sales, both by law and the rules of the court.

TRUSTEE'S COMMISSIONS ARE ALLOWED AS COMPENSATION for the risk and trouble involved in making a sale and disposing of the proceeds according to the decree, and are, therefore, proportioned to such risk and trouble as well as to his skill and diligence, and not exactly to the value of the subject of litigation.

TRUSTEE MAY EMPLOY AN AUCTIONEER to whom a fee may be allowed for making a sale.

TRUSTEE'S COMPENSATION MAY BE INCREASED, DIMINISHED, or withheld altogether, according to the circumstances of each case, in the sound discretion of the court.

TO PREVENT DOUBLE COMMISSIONS, as where a trustee dies after partly executing his trust, and another is appointed, the compensation should, if possible, be apportioned between them, according to the labor, trouble and deserts of each.

WHERE A DECEASED TRUSTEE HAS RECEIVED full commissions his successor should be allowed no more than a necessary recompense for his trouble.

HALF COMMISSIONS MAY BE ALLOWED to the second trustee in such a case on the amount collected by him.

BILL filed by the Farmer's Bank of Maryland against the representatives and trustees of John Gibson, deceased, for the sale of certain real estate mortgaged to the bank. It appeared that a decree of sale was made and one Ridout was appointed trustee to make such sale. A sale was accordingly made by him, one third of the purchase-money to be paid down, and the residue in three annual installments. The sale was ratified and full commissions allowed and apportioned to the trustee on the whole purchase-money. The trustee having died before all the purchase-money was paid, one Gassaway was appointed his successor to complete the trust. The latter having collected the balance of the purchase-money now asked to be allowed commissions thereon.

BLAND, Chancellor. It has been the practice of this court, for a long time, in a great variety of cases, but particularly in creditors' suits, to have its decrees and orders carried into effect

by a kind of occasional executive agents, called trustees, who perform offices in many respects entirely analogous to those of the regular executive officers of the courts of common law, and similar to those which, in the English court of chancery, are performed by the regularly constituted officers of that court, called masters in chancery. The trustees of this court hold a place under it and discharge their duties in a manner entirely unknown to the English chancery system. The principles by which they have been governed have grown out of the nature of the cases in which they have been employed; and, although often modified, as propriety and convenience seemed to suggest, they can not yet be regarded as being well settled, and as generally understood as the nature of the subject requires.

Trustees appointed and employed by this court have always been considered as its ministerial officers; and in whatever way they may have originated, the power to employ such agents having been recognized and affirmed by several legislative enactments, it may be now considered as finally and firmly established: 1785, c. 72, sec. 7; April, 1787, c. 30, sec. 5.

There are many civil offices which, according to the common law, a woman is incompetent to fill, such as those of judges, justices, etc.: *The King v. Stubbs*, 2 T. R. 395; Land H. Ass. 104, note; but from the general language of our constitution, for there is no express provision upon the subject, it appears that women are virtually excluded from all the various offices of our government, legislative, judicial and executive. From which it would seem to follow that females could not constitutionally be employed even as the mere ministerial agents of any one of the three departments, or be commissioned to perform any executive duty required by any one of the courts of justice. In cases of lunacy, if the lunatic be a female, it is generally deemed most proper to appoint a female committee to take charge of her person. And so in other cases of that class it has been sometimes held that the comfort of the unfortunate person would be best promoted by having his person placed under the care of a female committee, as by appointing the wife to be the committee of her husband, etc.: *Ex parte Le Heup*, 18 Ves. 226; *Ex parte Ludlow*, 2 P. Wms. 635. The chancellor of Maryland has always been regulated by similar principles and feelings; and, therefore, with a view to the peace and comfort of the lunatic, his daughter has been appointed trustee of his person with others who were constituted trustees of his estate: *H. Claggett's case*. MS. December 7, 1826.

In a creditor's suit, where the estate of the deceased was likely to be exhausted by the payment of his debts, the widow, on asking to be appointed trustee with a view to save the commissions for the support of herself and child, was, no objection being made, appointed trustee accordingly: *Dowig v. Marvel*, MS., October 16, 1789. And so in other cases where the appointment of a female appeared to be well calculated to promote the interests of all concerned, she has been employed as trustee to carry the decree into effect: *Ex parte Margaret Black*. Hence it would seem that although it does often happen that females are appointed as the executive trustees of this court, yet they can not be regarded as incompetent to act as such in any case whatever.

But where it appears that the duties of trustee are altogether, or in most respects, incompatible with the duties of the office which the proposed person holds, such as that of the register of this court, a clerk, or a judge of a county court, etc., such person can not be employed as a trustee by this court: *Bac. Abr.*, tit. Offices and Officers (K). In general, where the sale or disposition of any property is to be confided to a trustee, he must be required to give security for the faithful performance of his trust; and, consequently, as no one can be so appointed who is incompetent to contract, an infant or a *feme-covert* can not be a trustee in any such case. It is necessary, in all cases, that the trustee of the court should be a citizen, resident within its jurisdiction, not only that he may be the better able to discharge his duties, but that he may be continually within its reach and control; therefore, no one who is not a resident, or who is engaged in any pursuit, or who holds any office which may require, or subject him to go, or be ordered out of the state during any long intervals of time, such as masters of merchant vessels, or officers in the army or navy, can be appointed trustees. And as a trustee can only be appointed during the pleasure of the court, if he remove out of the state, neglect his duty, or is guilty of any injurious or improper conduct, he may, on application of any one concerned, be displaced, and another trustee appointed in his stead: *Ex parte Ord*, Jac. Rep. 94; *Logan v. Fairlee*, Id. 193; *Berry's case*, MS., May 14, 1803; *Chew v. Birkhead*, MS., June 30, 1798; *Kilty v. Quynn*, MS., January 5, 1813, and August 1, 1815.

In making the selection of a person to be employed as a trustee, the court exercises a sound discretion upon a view of the whole case; and as the chancellor may allow himself to be

actuated by feelings of benevolence upon such occasions where he can do so without injustice to any one, he has, therefore, as before observed, appointed the widow as trustee, that she might obtain the commissions for the benefit of herself and child. The recommendations of the parties are always attended to, and allowed to have their due weight as to numbers, amount of interest, and reasons assigned; where the parties are silent it has been usual to appoint the solicitor of the plaintiff as trustee, but a plurality of trustees is never appointed except on special application by petition, motion, or suggestion: *Edwards v. Buchanan*, MS., May 27, 1800; *Killy v. Quynn*, MS., February 5, 1805.

The kind of duties required of a trustee, and the manner in which they are to be performed, are most usually particularly prescribed by law, or specified in the decree or order to be executed. But here a trustee is indulged with a greater latitude of discretion in making sales of property than is allowed to a master in chancery in England: *Annesley v. Ashhurst*, 3 P. Wms. 282. In all cases where the trustee is directed to put the property into the market, by advertising and offering it for sale, he must do so; but, after that has been done, if it can not be sold at public auction upon the terms specified, he may accept of a bid upon different terms, or he may dispose of it at private sale, or upon other terms than those mentioned in the decree, because as he is, in all cases, required to make a report in writing of only such a sale as he can, on oath, state to have been in all respects fairly made, which can not be ratified, without consent, until public notice has been given to show cause, if any there be, why it should not be confirmed, there can be no danger or inconvenience in allowing him to deviate from the prescribed manner and terms of sale after the property has, by advertisement and an actual public offer to sell at the time and place appointed, been completely put into the market. A trustee can not, however, be allowed of himself to do any act which, in similar cases, is usually required to be done by such an agent, but which has not been particularly specified in the order or decree under which he holds his appointment; as where, in a creditor's suit, the court had omitted, in its decree, to direct the trustee to give notice to creditors to file the vouchers of their claims by a specified day, the trustee was not permitted of himself to give any such notice: *Isaac Williams's Estate*, MS., December 3, 1823.

According to the common law, no public officer was permitted

to take any fees for the performance of his duty, except such as were expressly allowed by law as a compensation for his trouble. Yet it appears that judicial, as well as ministerial officers, were allowed to make title to certain fees and perquisites by usage and custom, and although it would seem that no petty pecuniary charge should be permitted to intercept an extension of mercy intended to save the life of a fellow creature; yet it is said that in England, if a person pleads his pardon, the judges may insist on the usual fee of gloves to themselves and officers before they allow it: Co. Lit. 368; 2 Inst. 209; 3 Jac. L. Dict. 24. Before the revolution, the judicial and ministerial officers of the government, here as well as in England, were allowed to take fees: 1763, c. 18, s. 87, etc.; but the constitution has declared, that no chancellor or judge shall receive fees or perquisites of any kind: Dec. Rig., art. 30.

The fees of all regularly constituted ministerial officers have been regulated by law; November, 1779, c. 25; 1826, c. 247; and it is declared, "that the chancellor shall have full power and authority to allow any guardians, trustees, agents or factors, who shall make disposition or sale of either real, personal or mixed property, for the purpose of paying the debts of deceased persons or others, under and in virtue of any order or decree of the chancery court, a commission of one per cent. to seven and a half per cent. for their trouble in selling and disposing thereof, and paying the same away in pursuance of such order or decree as the chancellor shall, on consideration of all the circumstances, think just and right:" April, 1787, c. 30, s. 5; 1816, c. 154, s. 2 and 4. By a rule of this court, of the fourteenth of June, 1797, it was declared that "the standing order of this court, relative to the commission of trustees for the sale of real estates having been lost or mislaid, ordered, that in future the following allowances shall be made: On the first hundred pounds, seven per cent; on the second hundred pounds, six per cent.," and so on as in the existing rule, to the tenth hundred pounds, and then it is further declared, that "all above one thousand pounds at the rate of two per cent. This allowance is to be clear of all necessary, except personal, expenses; and is intended for cases where the sale is for ready money, or to satisfy one debt only. Where the sale is on credit, or to satisfy more than one creditor, the chancellor will make a further allowance from a half to one and a half per cent. on the whole amount of sales, according to the circumstances of the case."

From which it may be inferred that the lost standing order, of which this is a renewal, had been made, in conformity to the act of assembly, and soon after it was passed. It appears, however, that although fees, which have been settled by the ancient course of the court, can not be altered but by an act of the legislature: *Ex parte Jephson*, Prec. Ch. 551; yet this standing order for regulating the commissions of trustees has been frequently departed from; for there are many cases in which a commission not thus graduated, and varying from two and a half to seven and a half per cent. on the whole amount has been allowed: *Dulany v. Brice*, MS., December 27, 1794; *Dowig v. Marvel*, MS., October 16, 1789; *Anderson v. Anderson*, MS., April 17, 1789; *Dorsey v. Cooke*, MS., October 16, 1789; *Taylor v. Casanave*, MS., March 11, 1819; *Mildred v. Neil*, MS., February 26, 1788. But this act of assembly authorizing the allowance of a commission, as well as this rule by which that commission was graduated into the form of poundage fees, allowed to the sheriff for the sale of property taken in execution, it is evident were both confined to sales made "for the purpose of paying the debts of deceased persons or others;" and consequently, although they applied as well to sales of mortgaged property as to sales in creditors' suits and the like; yet they did not extend to any case of a sale made of real or personal property, because of its indivisible nature, for the purpose of dividing the proceeds among those by whom it was held jointly or in common; nor do they apply to the case of a sale made pending a suit of the property in litigation, because of its perishable nature, for the purpose of preserving its value to him to whom it may be determined to belong by the final decree. Yet in these, as well as in all other cases, whether embraced by the act of assembly or not, the trustee has been allowed a commission, or compensated for his trouble in one form or other. But by the existing standing order passed at March term, 1817, it is declared, that "on sales under decrees or orders of the court, the following allowances to be made to trustees, etc.: On the first three hundred dollars, seven per cent.; on the second, six per cent.; on the third, five; on the fourth, four; on the fifth, three and a half; on the sixth, three and a half; on the seventh and eighth, three; and on the ninth and tenth hundred dollars, two and a half per cent.; and three per cent. on all above three thousand dollars; besides an allowance for expenses not personal. The above allowance subject to be increased in cases of postponement, at the request of the

defendants, or of extraordinary difficulty or trouble from other circumstances; and to be lessened in case of negligence, etc., at the discretion of the chancellor." This rule is expressed in the most comprehensive terms, and embraces all sales made by a trustee, under the authority of the court, for any purpose whatever.

. The commission allowed to a trustee is given to him as a compensation for his trouble and risk in making the sale, bringing the money into court, and paying it away in the manner directed; or, in other words, for the performance of all the duties specified in the decree, and the subsequent orders in relation to the sale and its proceeds. It is sufficiently evident, from the language of the rules graduating the rate of the commission into the form of poundage fees, that the commission allowed to a trustee has never been considered in any respect as a commission in the mercantile sense of that term. A trustee of this court is a person of legal constitution with legal duties; and though some of his duties may have a mercantile mixture in them, he does not transact them as a merchant. He acts altogether as a legal officer, and must be paid as such in proportion to his diligence, skill, trouble and risk; not exactly according to the value of the subject in litigation: *The Rendsberg*, 6 Rob. Adm. 164; *Wood v. Freeman*, 2 Atk. 542. And, therefore, the term commission, in the mercantile sense, can not be applied to the compensation of a trustee, or any other officer of this court. But it has been found, in many cases, to be highly expedient, if not absolutely necessary, to have the property sold by an auctioneer; and it is obviously for the benefit of those concerned that all sales should be so conducted: *The Rendsberg*, 6 Rob. Adm. 168; although no fee is allowed to a sheriff for so making a sale: *The King v. Crackenthorp*, 2 Anst. 412. Therefore it has been deemed proper to permit the trustee to employ an auctioneer, to whom may be allowed a fee, not exceeding five dollars, for each separate and unconnected sale.

Considering the nature of the office of a trustee, it follows that as on the one hand his compensation may, because of the discharge of his duties being attended with a very unusual degree of labor and risk, be increased; so, on the other hand, his compensation, because of his duties having been improperly or but partially performed, may be altogether withheld, or proportionably diminished. As where it appeared that the trustee had been under the necessity of making several journeys or

voyages, or had already, and should thereafter incur much extraordinary trouble for the purpose of executing the decree, he was allowed a compensation in addition to the commission specified by the rule: *The Rendsberg*, 6 Rob. Adm. 163; *Hindman v. Clayton*, MS., March 8, 1805. On the other hand, where the trustee, after having given bond, had forbore at the request of the defendant to make the sale, he was allowed half commissions: *Carroll v. Jones*, MS., September 14, 1821. And where the sale made by the trustee had been set aside without any blame having been imputed to him, and afterwards another trustee had been employed who had made sale of the same property, the first trustee was allowed half commissions: *Lawson v. The State*, MS., July 3, 1810. And where the trustee, after having made sale of a part of the property, had removed beyond the jurisdiction of the court, he was allowed a commission of one and a half per cent.: *Berry's case*, MS., May 14, 1803. And where the trustee, after having made the sale, died before he had reported it to the court, two thirds of the commissions were awarded to his representatives, and one third to his successor, by whom the sale had been reported and completed: *Selby v. Selby*, MS., May 1, 1819. No general rule has, however, been laid down in any of these cases, and perhaps none can be established in regard to this matter; the circumstances of each case being so peculiar that each, as it occurs, must be submitted to the sound discretion of the court upon its own particular merits.

In some cases the fund may, to a certain extent, be burdened with double commissions, as in this instance: where the trustee dies after having actually received an amount of the proceeds of sale equal to the sum allowed to him as commissions upon the whole by a previous order of the court. In such case the court can not revoke its order merely because of the death of the trustee; and, therefore, the only mode in which this double charge could be prevented or corrected would be to alter the practice, so as to postpone the payment of the trustee's commission until the whole of his duties had been performed, or to authorize summary proceedings to be instituted to make his representatives refund in part, with which the succeeding trustee may be compensated for his trouble in collecting the balance. Under such circumstances, it seems to be fair, by way of analogy to the rule laid down by the legislature in regard to sheriffs and others: 1795, c. 88, s. 6; 1813, c. 102, s. 5; Bac. Abr. tit. Sheriff(I) to apportion the commission or poundage, where it

can be done, between the preceding and succeeding trustee, according to the sum which each may have collected, or on a consideration of the trouble and merits of each. But in this case the fund has been already charged with full commissions, and therefore should not now be again charged with more than a necessary recompense to the present trustee for his trouble; which in this, as in all similar cases, must be regulated according to the services actually rendered.

Whereupon it is ordered that this trustee be and he is hereby allowed half commissions on the amount stated to have been received by him.

COMPENSATION OF TRUSTEES.—It is perfectly well settled in England that no compensation will be allowed a trustee for labor or trouble bestowed on the trust estate. The leading case on this subject is *Robinson v. Pett*, 3 P. Wms. 132; S. C., 2 Lead. Cas. in Eq. 238. In that case Lord Chancellor Talbot thus stated the doctrine: "It is an established rule that a trustee, executor or administrator shall have no allowance for his care and trouble; the reason of which seems to be for that on these pretenses, if allowed, the trust estate might be loaded and rendered of little value; besides the great difficulty there might be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust or not." To the same effect is *Moore v. Frowd*, 3 My. & Cr. 50; see, also, 2 Perry on Trusts, sec. 904; and the learned note to *Robinson v. Pett*, 2 Lead. Cas. in Eq. 238, where it is shown that this continues to be the rule of the English courts.

ENGLISH DOCTRINE GENERALLY REJECTED IN THIS COUNTRY.—The doctrine of *Robinson v. Pett*, on this point, has never met with very great favor in the United States. It is true that Chancellor Kent, in several cases, expressed his approval of the principle: *Green v. Winter*, 1 Johns. Ch. 27; *Manning v. Manning*, Id. 534; but these decisions led to the enactment of a statute in New York in 1817, providing for compensation to executors and administrators, and it was soon determined by the adjudications of the courts of that state that other classes of trustees were within the equity of this statute. It is now the general rule in the United States, established either by express statutes or by the decisions of the courts, that executors, administrators, guardians and other trustees are entitled to reasonable and just compensation for their services: 2 Perry on Trusts, sec. 918; American note to *Robinson v. Pett*, 2 Lead. Cas. in Eq. 266. The prevailing opinion in this country on this subject is that expressed by Mr. Justice Story, that "the policy of the law ought to be such as to induce honorable men, without a sacrifice of their private interests, to accept the office and to take away the temptation to abuse the trust for mere selfish purposes, as the only indemnity for services of an important and anxious character:" 2 Story Eq. Jur., sec. 1268, n. It is found in practice that in this, as in other human transactions, the best way to secure honest service is to give honest pay.

In discussing this subject, in *Miller v. Beverleys*, 4 Hen. & Munf. 419, Chancellor Taylor says: "The English books lay it down that, regularly a trustee is not to have anything for his own labor and pains, though they ad-

mit that even there some have thought this a great hardship. It is true, we have adopted the principles of the English law in many respects, so far as they are not incompatible with the principles of our own government, but we have not, by that, adopted indiscriminately all of their decisions; and whatsoever may be my respect for them, as having been delivered by able judges, yet I must do here as they sometimes do there, that is to say, reject those decisions which do not confirm to the standard of that justice which commands us 'to live honestly, hurt nobody, and render every one his due.' Those who laid down the rule there, that a trustee should not have anything for his own labor and pains, seem to have done it without regard to that simple principle, but of unerring truth, 'that the laborer is worthy of his own hire;' and hence it might well have been thought a hardship, even in that country where so monstrous a rule was suffered to obtain. It certainly has never taken foothold in our country; but if it has, so far as I can go, I shall blot it out forever."

RULE AS TO COMPENSATION IN DIFFERENT STATES. — In nearly all the states provision has been made by statute for the compensation of executors, administrators and guardians. In some of them similar provision has been made in the case of trustees generally; and in others the statutory compensation allowed to executors, administrators and guardians has been extended by judicial construction to other classes of trustees.

In Alabama, the English rule denying compensation to trustees has never been adopted in its full extent, but, even in the absence of any statute, a reasonable and just recompense was allowed to persons in a fiduciary capacity for their time and trouble: *Spence v. Whittaker*, 3 Port. 327; *Phillips v. Thompson*, 9 Id. 667; *Bethea v. McColl*, 5 Ala. 314; *Benford v. Daniels*, 13 Id. 673; *Gould v. Hays*, 25 Id. 432; *Bendall v. Bendall*, 24 Id. 306; *Pearson v. Darrington*, 32 Id. 270. This compensation was generally in the form of a percentage upon the amount of receipts and disbursements: *Harris v. Martia*, 9 Ala. 899; *McGee v. Cowperthwaite*, 10 Id. 968; *Pinckard v. Pinckard*, 24 Id. 250; although a *per diem* compensation might be allowed: *Marshall v. Holloway*, 2 Stew. 453; *O'Neill v. Donnell*, 9 Ala. 738. It is now, however, provided by statute that executors and administrators may be allowed as a compensation for their trouble, risk and responsibility, commissions on receipts and disbursements not exceeding two and a half per cent. on each, and for extraordinary services such compensation as may be just: Walker's Rev. Code (1867), secs. 2161, 2162. For ordinary services the percentage mentioned in the statute is the fixed maximum, and evidence to prove the insufficiency of the compensation is inadmissible: *Newberry v. Newberry*, 28 Ala. 691; *Neilson v. Cook*, 40 Id. 498; *Dockberry v. McDowell*, Id. 476. But where the services are not those usually demanded of an executor or administrator, as where he is required to manage or superintend the estate, invest funds, etc., a large additional compensation will be allowed: *Reese v. Gresham*, 29 Ala. 91; *Ivey v. Coleman*, 42 Id. 410; *Waller v. Ray*, 48 Id. 468.

In Arkansas, executors and administrators are allowed by statute commissions not exceeding ten per cent. on sums less than one thousand dollars, five per cent. on sums exceeding one thousand dollars and less than five thousand dollars, and three per cent. on all sums over five thousand dollars: Gantt's Dig. Ark. St. (1874), sec. 122. In Arizona the allowance to executors and administrators is seven per cent. on the first one thousand dollars of the estate five per cent. on all sums over one thousand dollars and less than ten thousand dollars, and four per cent. on all amounts exceeding the latter sum: Comp. Laws of Arizona (1877) 273, sec. 221. The same allowance is made

in California as in Arizona: Code of Civ. Proc., sec. 1618, and is extended to trustees generally: Civ. Code, sec. 2274. There seems to be no statutory provision in Connecticut for the compensation of executors or other trustees. Reasonable compensation for personal services is, however, allowed to fiduciaries in that state: *Canfield v. Bostwick*, 21 Conn. 551; *Clark v. Pratt*, 30 Id. 282; although the soundness of the English rule as a general principle of equity is admitted in *Kendall v. New England Carpet Co.*, 13 Conn. 383. In Delaware the English rule prevails as to trustees, generally, and they are held not entitled to compensation for services: *Egbert v. Brooks*, 3 Harring. 112; *State v. Platt*, 4 Id. 154. It is, however, provided by statute that an administrator or trustee making a sale of the trust property under an order of the court shall be allowed, by way of commissions, six per cent. on the first three hundred dollars of the proceeds of such sale, four per cent. on the next four hundred dollars, three per cent. on the next three hundred dollars, two per cent. on the next one thousand dollars, one and a half per cent. on the next one thousand five hundred dollars, and one per cent. on all sums over three thousand five hundred dollars: Rev. Code of Delaware of 1852 as amended in 1874, 581, sec. 23.

In Florida, an administrator or executor is allowed a commission not exceeding six per cent. on sales of personal property, and in addition thereto a fair and just compensation for services in administering upon the estate: Bush's Dig. of the Laws of Florida (1872), 65; *Moore v. Felkel*, 7 Fla. 44. In Georgia, the English rule was abrogated as early as 1764, and a statute enacted providing for the compensation of executors and other trustees: *Lowce v. Morris*, 13 Ga. 165. In that case, however, it was held that a trustee had a natural and inherent right to compensation. The present statute of Georgia allows to administrators, executors, guardians and other trustees a compensation not exceeding two and a half per cent. on moneys received, and two and a half per cent. on moneys paid out, and not more than ten per cent. in all for lending and collecting money on interest: Code of Georgia, secs. 2589 to 2596, 2448, 1834, 1835, 2342. In Illinois, it is provided by statute that guardians shall be allowed a "reasonable and just" compensation for their services: Rev. Statutes (1874), 563, sec. 42; and that executors and administrators shall be allowed a compensation not to exceed six per cent. on the amount of the personal estate, and not more than three per cent. on the sale or letting of land, with such additional sums for costs and charges of collecting and defending claims by or against the estate as may be reasonable: Rev. Statutes (1874), 127, sec. 132. But it seems that in the absence of any statutory provision it is a general rule in that state, that "a trustee is not entitled to compensation, either for his labor or time bestowed in the care of the trust, unless it is by express stipulation or agreement:" *Constant v. Matteson*, 22 Ill. 547; *Hough v. Harvey*, 71 Id. 72.

It is provided by statute in Indiana that the court may allow to an executor or administrator such compensation as it may deem just, but that if a compensation is provided for an executor by the will of the testator, that shall be a bar to any further or different allowance, unless the compensation so provided is renounced in the manner pointed out by the statute: 2 Davis' Rev. Stat. (1876), 545, 546. In Iowa, it is provided by statute that such compensation may be allowed to guardians as may be just and reasonable: Code of Iowa (1873), 403, sec. 2256. Executors are allowed as full compensation for ordinary services, a commission upon personal estate sold or distributed, and upon real estate sold for the payment of debts, five per cent. for the first one thousand dollars, two and a half per cent. on sums over one thousand dollars and under

five thousand dollars, and one per cent. on all over five thousand dollars; and it is provided that in case of actual and necessary services of an extraordinary character, a further just and reasonable allowance may be made: Code of Iowa (1873), 427, secs. 2494, 2495; *Patterson v. Bell*, 25 Iowa, 149. In Kansas, executors and administrators are allowed such reasonable compensation as the court may award upon a due hearing; but if compensation is provided for by the will of the deceased, it is a bar to any other allowance, unless renounced: Dassel's Comp. Laws of Kansas (1879), 430, secs. 2449, 2450. In Kentucky, executors, administrators and curators are allowed not to exceed five per cent. on the first one thousand dollars, four per cent. on the second one thousand dollars, three per cent. on the third one thousand dollars, and two per cent. on the remainder: Bullock and Johnson's Gen. Stat. of Kentucky (1873), 454, sec. 52. But although there has always been in that state a disposition to allow just and reasonable compensation to executors, administrators and guardians, the same liberality seems not, until a comparatively recent period, to have been indulged towards other trustees. On the contrary, the courts were apparently inclined to hold with respect to other classes of fiduciaries to the strict English rule, that a trustee is not entitled to compensation for his personal services in the management of the trust estate: *Breckenridge v. Brooks*, 12 Am. Dec. 401; *Miles v. Bacon*, 4 J. J. Marsh. 463; *Jennings v. Davis*, 5 Dana, 134; *Hite v. Hite*, 1 B. Mon. 179. But in *Phillips v. Bustard*, 1 Id. 350, it was determined that the principle that "the laborer is worthy of his hire" is one of general application, and that there was no reason why any class of trustees should be made an exception to it. The general rule is now in that commonwealth to allow reasonable compensation to all classes of trustees: *Greening v. Fox*, 12 B. Mon. 190; *Fleming v. Wilson*, 6 Bush, 610.

The Louisiana code provides that an executor having "general seisin of the estate" shall have for his care and trouble two and a half per cent. on the amount of the inventory, deducting non-productive property and worthless debts; but that in case he has not such general seisin his commissions shall be allowed only on the estimated value of objects which he has in his possession: Voorhees' Rev. Civ. Code (1875), articles 1683, 1684. This compensation is apportioned among the executors where there are several, unless the testator has divided their functions, when each receives commissions on the part administered by him: Art. 1685. A bequest to an executor takes away his right to compensation, unless a contrary intention is indicated in the will: Art. 1686. The compensation fixed by the code can not be varied by the court: *New Orleans v. Baltimore*, 15 La. Ann. 625; *Succession of Sprowl*, 21 Id. 544. In Maine, executors, guardians and trustees are allowed one dollar for every ten miles travel to and from court, and one dollar for each day's attendance; and also, at the discretion of the court, a commission of five per cent.: Rev. Stat. of Maine (1871), 501, c. 63, sec. 29. In Maryland it was provided by statute, in 1798, that executors and administrators should be allowed, as compensation for their services, commissions not exceeding ten per cent. on the amount of the inventory, and not less than five per cent., at the discretion of the orphans' court: *Wilson v. Wilson*, 3 Gill. & J. 20. Such is now the law in that state, but, if necessary, extra compensation may be allowed for extraordinary expenses: 1 Maryland Code, Pub. Gen. Laws (1860), 618, art. 93, sec. 5. If any legacy is given to the executor by way of compensation, unless it is clearly insufficient, no further allowance can be made: Id. sec. 6. Compensation by commissions is generally preferred in that state to *per diem*: *Ringgold v. Ringgold*, 1 Harr. & G. 27. The decision of the court as to the allowance of commissions within the maximum and minimum of the stat-

ute is final and not reviewable: *Wilson v. Wilson*, 3 Gill. & J. 20; *Brady v. Dilley*, 27 Md. 583; *Nicholls v. Hodges*, 1 Pet. 562; *West v. Smith*, 8 How. U. S. 402. If there is only partial administration the court may allow only one per cent., or even less: *McPherson v. Israel*, 5 Gill. & J. 60; *Parker v. Gwynn*, 4 Md. 423. It is the province of the court also to determine whether or not an executor is entitled to extra compensation: *Scott v. Dorsey*, 1 Harr. & J. 227. It was held in *McKim v. Duncan*, 4 Gill. 72, that the court could not be deprived of its power to allow compensation to an executor, even by a positive direction in the will. The compensation allowed is to be proportioned to the labor and trouble involved in the administration: *Gwynn v. Dorsey*, 4 Gill. & J. 453. Where a prior administrator has been allowed, the maximum compensation authorized by statute an administrator *de bonis non* is not thereby deprived of the right to commissions on the balance coming into his hands: *Lemmon v. Hall*, 20 Md. 168. The rule as to compensation of executors and administrators in Maryland is such a wide departure from that of the English common law that the office is regarded in that state as one of "profit," and the statute provides for a tax on the commissions derived therefrom: *Owings v. State*, 22 Md. 116. In analogy to the compensation provided by statute for executors and administrators it is held that conventional trustees are also entitled to commissions on trust funds in their hands, as a recompense for their services: *Northern etc. R. R. Co. v. Keighler*, 29 Md. 572; so, too, of receivers: *Abbott v. Baltimore etc. Packet Co.*, 4 Md. Ch. 310.

In Massachusetts the English rule is rejected and a reasonable compensation is allowed to executors and administrators under the provisions of a statute: Gen. Statutes of Massachusetts, 1860, c. 98, sec. 10; and the same rule is applied by the courts to other trustees: *Barrell v. Joy*, 16 Mass. 221. In that case Parker, C. J., said: "It will probably be for the advantage of all who are concerned in estates held in trust that such compensation should be made, as more care and diligence may be expected and required where there is a compensation." But in *Gibson v. Crehore*, 5 Pick. 146, it was said by the court that the English rule was rejected not because it was unjust, but because it was opposed to usage and practice. The compensation allowed in that state to trustees is regulated by the circumstances of the case, and generally takes the form of a percentage on trust moneys: *Denny v. Allen*, 1 Pick. 147; *Longley v. Hall*, 11 Id. 120; *Ellis v. Ellis*, 12 Id. 178; *Scudder v. Crocker*, 1 Cush. 323; *Urann v. Coates*, 117 Mass. 41. It is provided by statute in Michigan that executors and administrators shall receive as compensation a *per diem* of one dollar and fifty cents; but an extra allowance may be made for extraordinary services: 2 Comp. Laws of Michigan (1871), 2047, sec. 7441; and the same compensation is allowed to trustees appointed by the probate court to manage the estates of deceased persons: Id. 1565, sec. 5242. In Minnesota executors and administrators are allowed two dollars per day for actual services; but in cases of unusual difficulty and responsibility the court may allow such further sum as the judge may deem reasonable: 2 Bissell's Stat. at Large (1873), 967, c. 52, sec. 6. But if the will of a testator provides for a compensation to the executor, that will be deemed sufficient: 1 Bissell's Stat. at Large (1873), 669, c. 35, sec. 149. The Mississippi statutes provide for a compensation to an executor or administrator for his trouble by a commission of not less than one nor more than seven per cent. on the estate: Rev. Code of 1871, sec. 1172. Within these limits the compensation rests in the sound discretion of the court: *Satterwhite v. Littlefield*, 13 S. & M. 307; *Cherry v. Jarratt*, 25 Miss. 221; *Sprott v. Baldwin*, 33 Id. 581; *Powell v. Burrus*, 55 Id. 105. In Nebraska the statute allows to ex-

executors and administrators five per cent. on the first one thousand dollars, two and a half per cent. on all sums over one thousand dollars, and less than five thousand dollars, and one per cent. on all sums over five thousand dollars; but extra compensation may be given for extra services: Gen. Stat. of Nebraska (1873), 331. In New Hampshire executors are held entitled to commissions for receiving, investing and paying over money, as being more equitable than a *per diem* compensation: *Gordon v. West*, 8 N. H. 444; *Wendell v. French*, 19 Id. 205; *Tuttle v. Robinson*, 33 Id. 104; *Lund v. Lund*, 41 Id. 355. In New Jersey it is provided that executors, administrators, guardians and trustees, shall be allowed commissions on moneys coming into their hands not exceeding seven per cent. on one thousand dollars or less, four per cent. on sums exceeding one thousand dollars but less than five thousand dollars, three per cent. on sums over five thousand dollars and less than ten thousand dollars, and two per cent. on all over ten thousand dollars; but that on estates over fifty thousand dollars the compensation shall not exceed five per cent. and shall be determined by the orphans' court in accordance with the actual services rendered. Nixon's Dig. 566, sec. 98, 99. Prior to this statute no fixed rate of compensation seems to have been established; but the statute merely provided that the allowance should be according to the actual pains, trouble and risk in settling the estate: *Warbass v. Armstrong*, 10 N. J. Eq. (2 Stock.) 263; *Voorhees v. Stoothoff*, 6 Halst. 145. Commissions were generally preferred, however, to a gross sum as a form of compensation: *State Bank v. Marsh*, 1 N. J. Eq. (1 Sax.) 288. And prior to 1855 these commissions covered not only compensation for personal services, but expenses also: *Lloyd v. Rowe*, 20 N. J. L. (Spencer) 680.

In New York the English rule was established by Chancellor Kent, in *Green v. Winter*, 1 Johns. Ch. 37, and *Manning v. Manning*, Id. 534, but was almost immediately abrogated by statute, for which reason that part of the learned chancellor's opinion, in *Green v. Winter*, which was devoted to this subject is omitted in the report of the case in 7 Am. Dec. 475, as being entirely obsolete learning in that state. In 1817 the legislature passed an act providing for an allowance by the court of chancery of reasonable compensation to executors, administrators, and guardians for their services according to a fixed rate. In obedience to this statute, Chancellor Kent, by an order of court of October 16, 1817, fixed the rate of compensation at five per cent. on all sums not exceeding one thousand dollars, two and a half per cent. on sums over one thousand dollars, but not exceeding five thousand dollars, and one per cent. on sums exceeding five thousand dollars, of moneys received and paid out: 3 Johns. Ch. 630. The same rate of compensation is now provided by express statute except that the sum of ten thousand dollars has been substituted for five thousand dollars as the maximum upon which two and a half per cent. will be allowed: 3 Banks' Rev. Stat. (6 ed.) sec. 71, p. 101. Prior to the enactment of this latter statute, it was held that the court of chancery, under the statute of 1817, could award compensation only according to an established rate: *McWhorter v. Benson*, Hopk. Ch. 28; *Vanderheyden v. Vanderheyden*, 2 Paige, 288; *Hosack v. Rogers*, 9 Id. 461; *Matter of Livingston*, Id. 439. An arbitrary allowance in lieu of the commissions provided for by statute can not be made: *Burtis v. Dodge*, 1 Barb. Ch. 77. It has been decided, also, that the statutory compensation is not a mere matter of grace, but that the executor's right thereto is absolute: *Halsey v. Van Amringe*, 6 Paige, 12. It seems, too, that the commissions provided for by the statute are not limited to moneys received and paid out, but may be computed on real, as well as personal, estate: *Stevenson v. Maxwell*, 2 Sandf. Ch. 284; *Matter of De Peyster*, 4 Id. 511; *Wagstaff v. Lowerre*, 23 Barb. 209. Under

former statutes in New York, when there were several executors, the commissions allowed were apportioned among them, so far as practicable, according to the service performed by each: *Valentine v. Valentine*, 2 Barb. Ch. 430; *White v. Bullock*, 20 Barb. 91. Under the statute of 1863, on estates of over one hundred thousand dollars, where there are three executors, full commissions are allowed to each; if there are more than three, the compensation which would be allowed to three is apportioned among *Van Nest's Estate*, 1 Tuck. 130.

Although the New York statute of 1817, as well as those which have been since enacted, provided in terms only for the compensation of executors, administrators and guardians, it has been determined that trustees generally are within the equity of the statute, and are entitled to compensation on similar principles: *Matter of Roberts*, 3 Johns. Ch. 43; *Meacham v. Sternes*, 9 Paige, 398; *Matter of Livingston*, Id. 439; *Duffy v. Duncan*, 32 Barb. 587; *Ogden v. Murray*, 39 N. Y. 202. But if the trust deed provides for a "reasonable compensation" to the trustee he is not limited to the allowance in the statute, but the reasonableness of the compensation is determined by the facts of the particular case: *Matter of Schell*, 53 N. Y. 263. It was held in *Jewett v. Woodward*, 1 Edw. Ch. 195, that voluntary assignees are not entitled to commissions except by express agreement, but that compensation may be allowed them on the principle of *quantum meruit*. An insolvent voluntarily assigning his property can not fix a greater rate of compensation to his assignees than that allowed by law: *Barney v. Griffin*, 2 N. Y. 365; *Nichols v. McEwen*, 21 Barb. 65.

In North Carolina it seems that the English rule formerly prevailed: *Schaw v. Schaw*, Taylor, 125; but in 1799 it was provided by statute that executors, etc., should be allowed in addition to their expenses, commissions not exceeding five per cent.: *Clark v. Colton*, 2 Dev. Eq. 51. And this is now the law in that state: Battle's Revisal, 419, c. 45, sec. 146. By analogy the same compensation is allowed to trustees by compact and fiduciaries generally: *Boyd v. Hawkins*, 2 Dev. Eq. 329; *Sherrill v. Shuford*, 6 Ired. Eq. 228; *Raiford v. Raiford*, Id. 490; *Ingram v. Kirkpatrick*, 8 Id. 62. Where there are several trustees, each is entitled to compensation in proportion to his actual services: *Grant v. Pride*, 1 Dev. Eq. 269; *Perry v. Maxwell*, 2 Id. 488; *Hodge v. Hawkins*, 1 Dev. & B. Eq. 564. In Ohio executors and administrators are allowed commissions on personal estate collected and accounted for, and on proceeds of real estate sold for the payment of debts at the rate of six per cent. for the first one thousand dollars, four per cent. for all sums over one thousand dollars, and less than five thousand dollars, and two per cent. for all sums over five thousand dollars; and extra compensation may be awarded for extraordinary services: 1 Swan & Critch. 299, sec. 170. Assignees for the benefit of creditors are also allowed commissions: 4 Sayler's Statutes of Ohio, 3202, 3203. It is also provided that testamentary trustees shall receive just and reasonable compensation for their services: 4 Sayler's Statutes, 2918. In Oregon an executor or administrator is allowed seven per cent. on the first one thousand dollars, five per cent. on sums over one thousand dollars and less than two thousand dollars, four per cent. on all sums over two thousand dollars and less than four thousand dollars, and two per cent. on all sums over four thousand dollars, with a provision for extra compensation for extraordinary services: General Laws, Deady & Lane, (1872) 335.

In Pennsylvania, compensation was allowed to executors from a very early period: *Wilson v. Wilson*, 3 Binn. 560. And other trustees were held to be within the equity of the rule: *Prevost v. Gratz*, 3 Wash. C. C. 434. It is now provided by statute that the court may award to assignees and other trustees a

reasonable and just compensation for their services, out of the effects in their hands, where no other compensation is fixed by the contract or instrument: Bright. Purd. Dig. 971, sec. 29. Where an executor is also a trustee only single commissions will be allowed: Id. 1322. No fixed rate of compensation is provided, either for executors or other trustees: *Pusey v. Clemesen*, 9 Serg. & R. 204. The allowance is ordinarily made in the form of commissions, but it may be by a sum in gross: *Harland's Accounts*, 5 Rawle, 323; *Kennedy's Appeal*, 4 Pa. St. 149; *McElhenny's Appeal*, 46 Id. 347; *Biddle's Appeal*, 83 Id. 340. Commissions vary with the circumstances of each case. The usual rate is two and a half or three per cent. on real property, and five per cent. on personal: *Miller's Estate*, 1 Ash. 323; *Guien's Estate*, Id. 317; *Walker's Estate*, 9 Serg. & R. 223; *Armstrong's Estate*, 6 Watts, 236; *Nathans v. Morris*, 4 Whart. 388; *Stevenson's Estate*, Id. 98; *Montier's Estate*, 7 Phila. 491; *Pennell's Appeal*, 2 Pa. St. 216; *Heckert's Appeal*, 24 Id. 482; *Duval's Appeal*, 38 Id. 112; *Robb's Appeal*, 41 Id. 45; *Snyder's Appeal*, 54 Id. 67; *Whelen's Appeal*, 70 Id. 410; *Eshleman's Appeal*, 74 Id. 42. And it seems that the number of executors makes no difference in the rate: *Aston's Estate*, 5 Whart. 228. It has been held that the allowance of compensation is not a matter of strict and absolute right on the part of the fiduciary, but rests in the sound discretion of the court: *Cassel's case*, 3 Watts, 443.

It was provided in South Carolina, as early as 1745, that trustees generally should be allowed commissions upon trust property, as a compensation for their services: *Muckenfuss v. Heath*, 1 Hill's Ch. 182; *Wallace v. Ellerbe*, Rich. Eq. Cas. 49. Another act was passed in 1789, providing for commissions to executors: *Ramsay v. Ellis*, 3 Desau. 78. The present statute in that state on that subject is substantially the same as that which is in force in Georgia, as stated above: Rev. Stat. of South Carolina (1873), 462, c. 91, secs. 4, 5 and 6; *Tevaux v. Ball*, 1 McCord's Ch. 458; *Massey v. Massey*, 2 Hill's Ch. 492; *Briggs v. Holcombe*, 3 Rich. Eq. 15. In Tennessee, it is provided by statute that executors and administrators shall be allowed "reasonable compensation:" Code of 1858, sec. 2356. In Texas, the compensation allowed to executors and administrators is five per cent. on sums actually received, and the same percentage on sums paid out: Paschal's Annotated Digest, sec. 1340. In case of necessity, further compensation will be allowed: Id.; *Davenport v. Lawrence*, 19 Tex. 317.

The English rule has never been adopted in Vermont, and it has always been an established principle in that state that a trustee is entitled to a reasonable compensation for his services: *Hubbard v. Fisher*, 25 Vt. 539. Executors, administrators and guardians are allowed a *per diem* compensation; and in cases of unusual difficulty, such additional compensation as the court may deem reasonable may be awarded: Gen. Stat. of Vermont (1862), c. 126, sec. 50. This compensation may be in the form of a percentage: *Hapgood v. Jennison*, 2 Vt. 294; or of a gross sum: *Evarts v. Nason*, 11 Id. 122. In Virginia fiduciaries have been allowed a reasonable recompense for their services from a very early period: *Nimmo v. Commonwealth*, 4 Am. Dec. 488. It is so provided by statute: Code of Virginia, 1873, tit. 39, c. 128, sec. 25. No fixed rate of compensation has been established but the usual rate is five per cent. on the amount of the receipts: *Granberry v. Granberry*, 1 Am. Dec. 455; *Lyons v. Byrd*, 2 Hen. & Munf. 22; *Waddy v. Hawkins*, 4 Leigh, 458; *Boyd v. Oglesby*, 23 Gratt. 674. But this compensation may be increased if the case requires it: *Fitzgerald v. Jones*, 1 Munf. 150; *McCall v. Peachy*, 3 Id. 288; *Cavendish v. Fleming*, Id. 198; *Hipkins v. Bernard*, 4 Id. 83; *Carter v. Cutting*, 5 Id. 223; *Boyd v. Oglesby*, 23 Gratt. 674. In West Virginia,

fiduciaries are allowed compensation, either by way of commissions or otherwise, as may be deemed just: 2 Kelly's Rev. Stat. (1879) 625, c. 92, sec. 18. The provisions of the Wisconsin statutes upon this subject are substantially the same as those of Nebraska, *supra*: 2 Taylor's Stat. (1872) 1534, sec. 66, 1523, sec. 24, 1240, secs. 10 and 11.

WANT OF FIDELITY FORFEITS A TRUSTEE'S RIGHT to compensation upon obvious principles of justice. Hence, if the trustee is dishonest, or unfaithful, or negligent, or reckless in the performance of the duties of the trust, no compensation will be allowed: *Swartswalter's Account*, 4 Watts, 77; *Stelman's Appeal*, 5 Pa. St. 413; *McCahan's Appeal*, 7 Id. 56; *Drysdale's Appeal*, 14 Id. 531; *Greenfield's Estate*, 24 Id. 232; *Witmer's Appeal*, 28 Id. 376; *Landis v. Scott*, 32 Id. 495; *Berryhill's Appeal*, 35 Id. 245; *Robinett's Appeal*, 36 Id. 174; *Stearley's Appeal*, 38 Id. 525; *Hermstead's Appeal*, 60 Id. 423; *Gordon v. Matthews*, 30 Md. 235; *Blauvelt v. Ackerman*, 23 N. J. Eq. (8 C. E. Green,) 495. So where he makes use of the trust funds in his own business: *Norris' Appeal*, 71 Pa. St. 106; or neglects to invest: *Warbass v. Armstrong*, 10 N. J. Eq. (2 Stock.) 263; *Frey v. Demarest*, 17 N. J. Eq. (2 C. E. Green,) 71; *Lathrop v. Smalley*, 23 Id. 192; *Knight v. Walsh*, 24 Id. 498. So where he permits his bailee to waste the funds: *Dyott's Estate*, 2 Watts & S. 557. And where the trustee's negligence in the management of the trust arises from kind feelings towards the widow of the intestate, his compensation will nevertheless be forfeited: *Smith's Appeal*, 47 Pa. St. 424. Where the trustee fails to keep proper accounts, make proper settlements or returns, compensation will be refused: *Marcy's Account*, 24 N. J. Eq. (9 C. E. Green,) 451; *Frazier v. Vaux*, 1 Hill's Ch. (S. C.) 203; *Fall v. Simmons*, 6 Ga. 265; *Kenan v. Hall*, 8 Id. 417. It was said, however, in *French v. Ragland*, 2 Dev. Eq. 137, that although it was a general rule to refuse compensation for a failure to keep proper accounts, yet it was not universal. In *Wistar's Appeal*, 54 Pa. St. 60, it was held that compensation might properly be reduced, if not denied altogether on this ground. In *Gee v. Hicks*, Rich. Eq. Cas. (S. C.) 5, it was decided that notwithstanding a trustee's failure to make proper returns, he was nevertheless entitled to commissions on paying over the balance in his hands. So in *Kee v. Kee*, 2 Gratt. 116, it was held that an executor who had not kept the proper accounts, but who was nevertheless charged with all that he was justly responsible for, was entitled to the usual commissions. A mere mistake of judgment will not forfeit a trustee's right to compensation: *Myers' Appeal*, 62 Pa. St. 104. So where he mixes the trust funds with his own without any dishonest purpose: *Parker's Estate*, 64 Pa. St. 307.

WAIVER OF COMPENSATION.—The right of a trustee to compensation may be waived by an express agreement not to demand it: *Ridgely v. Gittings*, 2 Har. & G. 58. So where the trustee makes a gratuitous gift of his services: *Vestry v. Barksdale*, 1 Strob. Eq. 197; or voluntarily assumes the trust from motives of kindness: *Haglar v. McCombs*, 66 N. C. 345. But a mere expression of an intention by the trustee not to charge commissions, does not debar him of a right thereto: *Eversfield v. Eversfield*, 4 Har. & J. 12. If the trust deed fixes the compensation, the trustee is bound by it: *College v. Wellingham*, 13 Rich. Eq. 195. And if the parties settle the matter by mutual agreement, the trustee can not afterwards charge commissions: *Jackson v. Jackson*, 3 N. J. Eq. (2 Green,) 113.

DOUBLE COMMISSIONS are against the policy of the law. Hence, where the same person acts as executor or guardian, and also as trustee, he will not ordinarily be allowed compensation in both capacities: *Holley v. S. G.*, 4 Edw. Ch. 284; *Blake v. Pegram*, 101 Mass. 592.

HALL'S CASE.

[1 BLAND'S CH. 203.]

DEVISE IN LIEU OF DOWER—ELECTION.—In case of a devise to a widow in lieu of dower she has an election either to accept the devise or claim dower.

ELECTION ONCE MADE AND AFFIRMED by bringing suit, will not be annulled on the ground of mistake, except upon strong and clear proof.

DEVISE WHEN VOID AS TO CREDITORS.—A devise in the nature of a mere gift, or appointing persons to take in lieu of the heirs, is void as to creditors.

DEVISE IN LIEU OF DOWER NOT VOID AGAINST CREDITORS.—A devise in lieu of dower, if accepted, discharges a highly favored debt, and the widow is therefore deemed a purchaser for a fair consideration, whose claim, to the extent of the value of her dower, is valid against creditors.

EXCESS OF DEVISE OVER THE VALUE OF THE DOWER is void as to creditors.

CREDITOR'S bill filed by certain creditors of the estate of Joseph Hall, deceased, and by Margaret Hall, his widow and executrix, against the devisees, alleging the insufficiency of the personal estate to pay the debts, and praying a sale of the realty. A decree of sale was entered accordingly, and the sale duly made and confirmed. The widow then filed a petition setting forth that her husband had devised to her a large portion of his estate, which she had elected to accept soon after his decease when she was unacquainted with his affairs; but that it was now ascertained that the debts if paid to her exclusion would absorb most of the estate, and leave her in a worse position than if she had claimed her dower. She, therefore, prayed that her election having been made improvidently, and under a misapprehension, might be annulled, and that she might be allowed her dower, or other suitable relief.

BLAND, Chancellor. This case having been submitted on the application and petition of Margaret Hall, the proceedings were read and considered.

The will of the deceased husband of this widow lay before her, and presented to her a choice between the estate therein bestowed, and that given by the law. In her election to take under the will, there is no apparent room even to suspect fraud, nor has the existence of any been intimated; and it is difficult to perceive how there could have been any mistake. But supposing it possible to show that a mistake had occurred, I should require from her a strong and clear case of misapprehension. She has heretofore formally made her election in the manner prescribed by law, and has solemnly re-affirmed that

choice by bringing this suit. An election thus deliberately made, repeated and adhered to, ought not to be lightly shaken or easily annulled. This widow must, therefore, be held firmly bound by her election; and can have no relief but such as may be altogether compatible with the choice she has thus made: *Butricke v. Broadhurst*, 1 Ves. jun. 171; S. C., 3 Bro. C. C. 88; *Wake v. Wake*, 1 Ves. jun. 335.

A devise which is merely of the nature of a donation, or that appoints persons to take as heirs in place of those designated by the law, must certainly be considered as void against creditors. But a devise in lieu of dower is one of a different character, and of much higher merits. It discharges a highly favored debt due from the testator; it relieves his real estate from a lien imposed by the law in favor of his wife, in preference to all others, with which he himself could have incumbered it by any contract of his own. In the language of the act of assembly, a widow electing to take under the will of her husband, is to "be considered as a purchaser with a fair consideration:" 1798, c. 101, sub. c. 13, s. 5; Sug. V. & P. 257. It is clear, therefore, that this devise is fraudulent as against creditors, only so far as it exceeds the value of the dower, in lieu and discharge of which it was given, and has been accepted.

The creditors have associated themselves with the widow and devisee of the deceased, and have asked to have the real estate sold for the payment and satisfaction of all. But these creditors now, it seems, propose to have their claims first satisfied in preference and exclusion of the devise to the widow. They who are the widow's opponents would thus bind her to her election to take under the will, which satisfied her claim that had a preference over theirs; and yet they would leave her to take, by that devise, nothing, or less than the amount of her legal claim. This can not be allowed. They who ask equity must do equity. These creditors must either permit the widow to take to the whole amount under the will, as is her choice, or allow her to obtain full satisfaction for her dower; because to the value of that, at the least, she is, both at law and in equity, "a purchaser with a fair consideration;" and to that extent, therefore, the devise must be sustained. The widow is clearly entitled to one or the other, either the devise or the dower; and since her taking the whole of the subject devised, which was, and is, her choice, has been objected to, she must be allowed to take as devisee to the full value of the dower, which she has relinquished, but no more;

Burridge v. Bradyl, 1 P. Wms. 127; *Blower v. Morret*, 2 Ves. 420; *Davenhill v. Fletcher*, Amb. 244; *Heath v. Dendy*, 1 Russ. 543.

Therefore, it is ordered that the said Margaret Hall be, and she is hereby allowed one seventh part of the proceeds of the real estate in the proceedings mentioned, in bar and in satisfaction of all that portion of the real and personal estate devised to her by her late husband, Joseph Hall, and which property so devised she had elected to take in lieu of her dower.

DEVISE OR LEGACY IN LIEU OF DOWER.—As to when a devise, legacy, or other provision made for a wife will bar her claim to dower, and when not, see *Evans v. Webb*, 1 Am. Dec. 308; *Hamilton v. Buckwalter*, Id. 350; *Larabee v. Van Alstyne*, 3 Id. 333; *Van Orden v. Van Orden*, 6 Id. 314; *Pickett v. Peay*, Id. 594; *Adsit v. Adsit*, 7 Id. 539; *Swaine v. Perine*, 9 Id. 318; *Wiseley v. Findlay*, 15 Id. 712, and note; and *Jackson v. Churchill*, *post*.

CHASE'S CASE.

[1 BLAND'S CHL. 206.]

FAILURE TO DENY ALLEGATIONS IN PETITION.—A petition, pending a suit, asking for the appointment of a receiver and setting forth new facts which are material, if not denied by a written answer on oath will be taken as true.

APPOINTMENT OF A RECEIVER DOES NOT AFFECT THE TITLE or involve a determination of it, but it can only be made on the application of one having an acknowledged interest.

MANIFEST ABUSE OF A TRUST by an habitual and prospective course of dealing, bringing the property into danger, is sufficient ground for the appointment of a receiver.

PROPERTY OR ITS RENTS AND PROFITS MUST BE IN DANGER to warrant the appointment of a receiver.

INSOLVENCY OF PARTY RECEIVING THE RENTS and profits exposes them to danger of loss, and will be a sufficient ground to appoint a receiver.

CLAIM OF THE WHOLE TITLE IS UNNECESSARY to authorize a party to make application for the appointment of a receiver; hence, a widow claiming dower in the premises may make the application.

PLEA AND ANSWER TO SAME MATTER.—Where a party pleads and answers to the same matter, the answer overrules the plea; so a demurrer is waived by a plea or answer to the same matter.

DECREE DISMISSING A BILL IS NO BAR to a subsequent suit, unless it is shown that there was an absolute determination that the party had no title, and that the matter is *res adjudicata*.

AGREEMENT TO DISMISS A SUIT is not necessarily a relinquishment of the right.

CONFIDENTIAL COMMUNICATIONS TO A SOLICITOR are privileged, and can not be revealed even after the termination of the suit.

OBLIGATION OF SECRECY IS THE CLIENT'S PRIVILEGE, and if waived by him, does not render the solicitor an incompetent witness.

ABSOLUTE CONVEYANCE AND BOND TO RECONVEY do not constitute a mortgage, unless it is clear from the contemporaneous agreements and dealings that such was the intention; and the absolute vendee having the legal title, his widow may have dower in the premises.

TERMS ATTENDANT UPON THE INHERITANCE have never been introduced into this state.

DOWER IN RENT.—A widow may be endowed of rent.

DOWER IN CASE OF LEASE BEFORE MARRIAGE.—Where one makes a lease for years, reserving rent before his marriage, his widow is entitled to dower in the reversion and in the rent immediately from her husband's death.

FEME-COVERT OF FULL AGE MAY CONVEY her land or relinquish her dower by a fine, but conveyance by fine has long been disused in Maryland.

ACKNOWLEDGMENT BY A WIFE to a deed in the form prescribed by statute passes her interest as effectually as a fine.

WIFE'S ACKNOWLEDGMENT OF A LEASE for years made by her husband is valid only to the extent of the lease, and she is entitled, immediately upon his death, to dower in the reversion and in the rent reserved, without delay of execution during the term.

DAMAGES OR MESNE PROFITS FOR DETENTION OF DOWER can be recovered at law only from the time of demand upon the heir.

ACCOUNT OF RENTS AND PROFITS ON ASSIGNING DOWER will be allowed, in equity, from the husband's death, but without costs if the claim is not opposed by the heir.

SEQUESTRATION OF HEIR'S INTEREST IS NOT ALLOWABLE to pay rents and profits awarded to the widow.

DOWER IN PROPERTY NOT DIVISIBLE may be assigned in the form of a rent distrainable of common right.

BILL to recover dower in certain premises in Baltimore, called the Fountain Inn, filed by Hannah K. Chase, widow of the late Samuel Chase, against his heirs and others. The case is sufficiently stated in the opinion of the chancellor on the final hearing. A preliminary question arose on a petition filed by the complainant for the appointment of a receiver. The ground of the application, as alleged in the petition, was that Samuel Chase, one of the defendants, who had the control and management of the property in which dower was claimed, had taken the benefit of the insolvent laws since the institution of the suit, thus subjecting the rents and profits to danger of loss.

BLAND, Chancellor. The petition for the appointment of a receiver standing ready for hearing, the parties were heard by counsel, and the proceedings read and considered.

The defendants have not thought proper to put in a formal answer in writing to the plaintiff's petition, but have been content with showing cause verbally. If a petition of this kind, bringing before the court a matter which could not have been

made the subject of a mere motion, because of the necessity of putting upon the record the new facts therein set forth and apprising the party of all the circumstances on which the application is made, so as to enable him to controvert them if he can, be not regularly and properly denied by a written answer on oath, the whole, or so much of it as is not denied, must, by analogy to the course of this court in similar cases, be taken to be true: *Shipbrooke v. Hinchinbrook*, 13 Ves. 393; 2 Harr. Pra. Chan. 40, 129, 133.

I have so recently had occasion to consider the general nature and utility of the power of this court to appoint a receiver, *Williamson v. Wilson*, April 24, 1826, 1 Bland C. 418, that it will be unnecessary upon this application to notice what has been said in argument as to the novelty, or the unsettled nature of the authority of this court to make such an appointment, or as to the very oppressive purposes to which, it is said, it may be applied. It will be sufficient here again to observe that I consider the matter as having been long since fully settled, and the power as one of as great utility as any which belongs to the court.

It has been mainly urged that the court will not appoint a receiver against the legal title, but upon very special and strong ground. This is admitted. But the matter in controversy between these parties is a legal title, or it is nothing. This is a bill for dower, a mere legal demand, and the relief the plaintiff seeks is to have her particular estate set apart out of the general estate of the defendants, and to have the rents and profits thereof accounted for. To this it is objected that a receiver can not be appointed, because the claim of the plaintiff does not extend to the whole, but only to one third of the property in controversy.

The appointment of a receiver does not involve the determination of any right, or affect the title of either party in any manner whatever; but still an application for such an appointment can only be made by those who have an acknowledged interest, or where there is strong reason to believe that the party asking for a receiver will recover. I am of opinion that the plaintiff has a sufficient presumption of title to rest this application upon: *Stitwell v. Williams*, 6 Madd. 49; *Clark v. Dew*, 1 Rus. & Myl. 103; *Davis v. Marlborough*, 2 Swans. 146. But unless she has also shown that the rents and profits are in imminent danger, a receiver can not be appointed. A manifest abuse of a trust by an habitual and prospective course of dealing, bringing the property into danger, has been held to afford

sufficient ground for the appointment of a receiver; but in no case has there been the least hesitation in making such an appointment, where the party in the actual receipt of the rents and profits was shown to be insolvent. Here the property is in the hands and under the control of the defendant, Samuel Chase, and it is shown by the exhibits attached to the petition that he has, pending this suit, actually obtained the benefit of the insolvent laws. He is, therefore, legally and in fact insolvent. Hence it clearly appears that the rents and profits of the property in question are exposed to imminent danger, or, indeed, to inevitable loss.

A receiver is appointed for the benefit of the interested party who makes the application, and for any others who may choose to avail themselves of it, and who may have an interest in the property proposed to be put into the hands of a receiver. The immediate moving cause of the appointment is the preservation of the subject of litigation, or the rents and profits of it, from waste, loss, or destruction; so that there may be some harvest, some fruits to gather after the labors of the controversy are over. The ulterior objects of the appointment are those contemplated by the suit itself; they are the several kinds of relief which may be asked for and obtained by the complainant's bill. Where the plaintiff claims the whole as a purchaser or by a superior title, if he succeeds, it eventuates that the appointment was entirely and exclusively for his benefit: *Lloyd v. Passingham*, 16 Ves. 59; *Davis v. Marlborough*, 2 Swans. 125. But so far from such being the only kind of cases in which a receiver has been appointed, they are in fact of the most rare occurrence. Where the plaintiff was a mortgagee, or a creditor suing in his own right alone, or for himself and other creditors, whose claims might or might not cover the whole amount: *Thomas v. Dawkin*, 3 Bro. C. C. 508; *Bowersbank v. Colasseau*, 3 Ves. 165; *Wilkins v. Williams*, Id. 588; *Hughes v. Williams*, 6 Id. 459; *Bryan v. Cormick*, 1 Cox, 422¹; *Dalmer v. Dashwood*, 2 Id. 378; or where the object of the bill was to obtain a fair division of the property, and to have debts paid: *Skip v. Harwood*, 3 Atk. 564; or where the portions to which the contending parties would be respectively entitled were uncertain until a division should be made by the court; or where one tenant in common took the whole rents and profits to the exclusion of his co-tenant; if the merits of the case required it, a receiver has been appointed and directed to take charge of the whole estate.

1. *Bryan v. Cormick*, 1 Cox, 422.

And, at the instance of a plaintiff who claimed as a purchaser, such an appointment has been made, even before answer, although it was urged in argument that a married woman who claimed a life estate under a post-nuptial settlement, would be stripped by it of "her only means of defense and subsistence:" *Metcalf v. Pulvertoft*, 1 Ves. & Bea. 180. It does not appear from any of the cases that such an objection as this now relied upon has ever before been made by any one in relation to the appointment of a receiver; and consequently it can not be regarded as of any weight whatever. I shall, therefore, put a receiver upon this estate. But as no person has been nominated by the parties for that office, I must let the selection of a suitable person lay over until I hear from them.

Ordered that a fit and proper person be appointed as a receiver, as prayed by the complainant's petition, with full power and authority to enter upon and take possession of the messuage and tenement in the bill of complaint mentioned; and to take care of, rent, or otherwise dispose of the same pending this suit, in such manner as he may deem most advantageous to the parties interested therein, subject to the further order of this court. And also with full power and authority to demand, sue for, and recover any rent now due, or which may hereafter become due for the same. And for the faithful performance of the trust reposed in such person to be appointed to act under this order, or which may be reposed in him by any future order of this court in the premises, he shall give bond to the state of Maryland in the penalty of ten thousand dollars, with surety or sureties to be approved by the chancellor. The compensation of such receiver shall be hereafter determined on a consideration of his trouble, skill and diligence in the premises. And it is further ordered, that on the fifth day of May next a proper and suitable person will be appointed a receiver under this order; provided that on or before that day the parties may nominate and recommend for the appointment to the chancellor such person or persons as they or either of them may think proper.

Two of the defendants subsequently filed a petition objecting to the appointment of a receiver. The petition was dismissed with costs, and a receiver appointed; and the case having been brought to a hearing, the following opinion on the merits was delivered April 28, 1827:

BLAND, Chancellor. This case standing ready for hearing,

the solicitors of both parties were fully heard, and the proceedings read and considered.

It appears from the bill as amended, and the plaintiff's exhibits, that the late Samuel Chase, after and during his marriage with the plaintiff, became seised in fee-simple of a certain real estate situated within the city of Baltimore, called the Fountain Inn, which property, on the twenty-sixth day of February, 1806, he leased to James Bryden for the term of fifteen years, reserving an annual rent of two thousand dollars. The plaintiff on a privy examination acknowledged the validity of this lease, and made a relinquishment of her dower in the usual form. Samuel Chase, the husband of the plaintiff, died on the nineteenth of April, 1811. The lease to Bryden expired on the twenty-sixth of February, 1821. Those who claimed under the late Samuel Chase leased this property to Basil Williamson, who had the possession thereof when this bill was filed. The plaintiff claims one third of this property as her dower; and she also claims a remuneration for the rents and profits of her third part from the death of her husband; and thereupon prays that dower may be assigned to her; that the property may be sold for the payment of the rents and profits due to her; or that the future accruing rents to which the defendants are entitled may be sequestered or placed in the hands of a receiver to be paid over to her until she is satisfied; and generally that she may have such relief as is suited to the nature of her case.

The defendants, Barney and wife, and Cole and wife, submit the case to the justice of the court. The defendant Williamson declares that he is totally ignorant of the plaintiff's pretensions; and therefore leaves her to sustain them; but admits that he holds as tenant under some of the other defendants. The defendant Richard M. Chase disclaims all interest in the matter in controversy. And Hester Ann, Matilda, and Frances T. Chase, the three infant children of the late Thomas Chase, who have been made defendants as heirs of their father, who was a defendant and died after he had answered, state their ignorance of the whole affair, and pray to have their interests protected. But their father does not seem to have had any interest in this property, which could have been affected by the plaintiff's claim; or if he had, it will be fully considered and disposed of in passing upon the defense which he jointly made before his death with three others of his co-defendants. Consequently all these defendants may be safely passed by without

any further notice, and the case may be at once disincumbered of everything in relation to them.

The defendants, Samuel Chase, Matilda Ridgely, and Ann Chase, have put in a joint and several plea and answer. They alone claim the property called the Fountain Inn. They contest the plaintiff's claim altogether, and in every shape. The whole opposition and the entire brunt of the controversy rest with them. They have couched their defense in the form of a plea and answer. The matter of their plea is extended over a wide surface in the foreground; and sets out all that mass of particulars of which their defense is composed. The matter of this plea amounts to this, that the plaintiff filed a bill against them on the fifth of July, 1813, and another on the fourteenth of February, 1814, in both of which she claimed dower in this same property; that the matter of those suits was finally settled, and thus they were dismissed; and therefore they plead those suits, the agreement and the dismissal of them in bar of the claim now made by the plaintiff.

But these defendants, not content with resting their case upon the matter thus set out by way of plea, have gone on to repeat the whole of the same matter, and to rely upon it, by way of answer. The bill always calls for an answer from the defendant as to all the matters of fact therein set forth. But one of the peculiar and proper offices of a plea is to present such a defense as shows that the defendant can not be compelled to make, or may well be excused from making, such an answer as the bill calls for; and therefore, upon the ground of inconsistency, the defendant can not be permitted, by way of plea, to aver that he ought not to be compelled to answer, as called upon in relation to any particular matter, and at the same time to put his defense, as to the same matter, into the form of such an answer as the bill calls for. Hence, if a defendant answers to anything as to which he has pleaded, he thereby overrules his plea, for his plea is only why he should not answer; so that if he answers he waives his plea to the same matter. The same principle is equally applicable to demurring and answering, and to demurring and pleading to the same part: *Gilb. For. Rom.* 58; *Mitf. Tr.* 320; *Beams' Pl. Eq.* 39. The plea of these defendants must, therefore, be totally rejected, as being overruled by the subsequent answer, covering exactly the same matter; and I have the less hesitation in thus striking it out, because it is evident from the answer that nothing at all necessary to the sound merits of the defense will be lost.

But in the answer, itself, of these defendants, there are matters which may be safely banished from it without in the least enfeebling the force of the defense. That which is related of the matter of the bill, filed on the seventeenth of February, 1813, by this plaintiff and John P. Paca; what is said about the letter, and the conveyances from John E. Howard to the late Samuel Chase; what is related of the late Samuel Chase's intentions to make advancements of property to his children; and the allegations respecting the rough draft of his will, with some other particulars of less note, can not certainly be at all material to the defense. I shall, therefore, lay them aside, as in no way necessary to the present matter in controversy.

The defense rests on the following grounds: 1. That the plaintiff has heretofore sued for dower in this property, and by the final termination of those suits her claim, if she ever had any, has been fully released or barred; 2. That if she had not been thus solemnly barred, yet she is not in law dowable of this property, because her late husband never had a fee-simple estate therein, but held only a mere equitable interest, as a mortgagee, to secure the payment of money lent by him; 3. Supposing these objections removed, that still her claim can be carried no further back than the twenty-sixth of February, 1821, when the lease to Bryden and her relinquishment of dower up to that period expired; and, lastly, supposing her claim to be valid, that yet the two thirds of this property, belonging to these defendants, can neither be sold nor sequestered as a means of satisfying the amount of the rents and profits which may be decreed to her. These are the great points of defense, the nature and validity of each of which must now be carefully considered and determined.

With regard to the first point. The defendants, Samuel, Matilda and Ann, claim this property, called the Fountain Inn, and allege that the plaintiff has released, or is barred of dower therein, by the agreement, and the manner in which two suits, heretofore instituted in this court to recover dower in the same property, have been finally adjusted and determined. If this allegation be well founded there is an end of the case, since it can not be necessary to inquire whether the plaintiff had been previously thereto dowable of this property, and much less to determine the extent to which she might have been entitled to recover.

This plaintiff, with John P. Paca, her trustee, filed a bill on the seventeenth of February, 1813, in this court, against the

representatives of the late Samuel Chase, to recover a certain amount of money alleged to be due to her; after which she filed one bill on the fifth of July, 1813, and another on the fourteenth of February, 1814, in which she presented herself as the widow of the late Samuel Chase, claiming dower in every parcel (the Fountain Inn among the rest) of the real estate of which her late husband had been seised during their marriage, against his heirs and all others whom she had found in possession of any part thereof. To these suits the defendants appeared and answered, when the parties came to an agreement, designated in this case as the exhibit S. M., by which the matters in dispute in all three of them were to be adjusted or withdrawn. This written agreement is without date; but the letter of Stephen and Magruder, dated on the twenty-eighth of September, 1816, speaks of propositions for compromising these suits as then depending. And the chancellor remarks, at the foot of his decree in the first cause, dated the seventeenth of July, 1817, that "it is passed as being considered within the meaning of the agreement signed by the parties." Consequently this agreement, S. M., must have been executed some time between those dates.

By the agreement S. M. a decree was to be passed in the first case in favor of the plaintiff, for the amount demanded, with costs, which was done accordingly on the seventeenth of July, 1817. As to the second and third, or the dower cases, as they may be called, the instrument of writing declares that, "it is also further agreed, that in the two last of the above causes, decrees shall pass, giving the complainant dower in the following tracts, pieces or parcels of land, to wit;" going on to specify certain property, without the least allusion to the Fountain Inn, and then proceeds in these words: "Provided, it shall appear to the satisfaction of the chancellor, by the exhibition of title papers or otherwise, as he may order, that the said Hannah K. Chase hath a right to dower in the same. And it is further agreed, that a compensation in money shall be paid to the complainant by the defendants, for and in lieu of her dower in the property above mentioned, and that such compensation shall be fixed by the chancellor, upon evidence offered to him of the value of the said respective pieces or parcels of land, by the actual sales, where sales are to be made by the trustees as aforesaid, and for want of sales by depositions showing such value, to be taken before some justice of the peace for Baltimore county, residing in the city of Baltimore, by either party, upon

giving three days' notice. And it is further agreed that the said bills be dismissed as to all the property in the proceedings mentioned, not specified and included in this agreement; and that the complainant pay the costs."

The motives which induced the parties to enter into this agreement are not expressed in the instrument itself, nor can they be clearly inferred from anything that is said in it. The first suit instituted by Hannah K. Chase and John P. Paca, seems to have no sort of connection with the subsequent dower cases. According to the agreement, the plaintiffs, in that case, were to have a decree for all they asked, and then it proceeds to speak of the dower cases, without making any allusion whatever to that case. Therefore, while confining our contemplation to the agreement alone, the first case, and everything relative to it, may be wholly laid aside.

Looking at this agreement, in relation to the dower cases alone, it seems to be wholly gratuitous, without any valuable consideration whatever moving from either party. The plaintiff was to recover nothing to which she could not produce a clear subsisting title. She was to be endowed of certain specified property, provided she satisfied the court that she was entitled to dower therein. It is neither said nor insinuated that she was to be endowed of any one parcel of land, in consideration of her relinquishing dower in any other parcel. In short, she was to be endowed of no land in which she was not legally entitled to dower, and to no greater amount than its exact value, to be determined by the court. The plaintiff agreed to dismiss her bills claiming dower, as to all the property not included in the agreement, and to pay all costs. This concluding branch of the agreement is perfectly in character with every other part of it. Like the rest, it is merely gratuitous, and, consequently, according to every principle of equity, it can not be construed into a release of any right, beyond the express and irresistible sense of the terms used.

The words of the agreement are, that "the bills be dismissed." Suppose this agreement had been followed out by a formal decree, then the court must have dealt with the matter in the manner in which it was submitted; that is, it must have determined upon the rights of the parties as to all the property specified in the agreement; and as to the residue, it could only have ordered, in pursuance of the agreement, "that the bills be dismissed with costs:" *Rowe v. Wood*, 1 Jac. & Walk. 345. To make a decree a good and available bar in any subsequent suit,

it is not sufficient merely to show that the bill was dismissed, but the party must go further and show that the matter of the bill was *res judicata*; that there was an absolute determination by the court that the party had no title: *Brandlyn v. Ord*, 1 Atk. 571; Mitf. Tr. 238; 2 Madd. Ch. 312; Beam. Pl. Eq. 218. But the chancellor could not, in those cases, have given any determination in relation to the plaintiff's title to dower in the Fountain Inn, because he was deprived of the means of doing so by the agreement, which simply directed that those suits as to that property should be dismissed with costs. No decree which the chancellor could have pronounced in pursuance of that agreement could have given to it any additional extent or force as a bar against the present plaintiff. There was, however, no formal decree ever passed in those cases; they were closed on the nineteenth of July, 1819, by the short docket entry "agreed," evidently in reference to this written agreement.

The question, therefore, recurs upon the agreement alone. It is stipulated that the bills be dismissed as to the property not included in the agreement. It is a contract to abandon those suits, but it is not a relinquishment of the right claimed by them. The two things are substantially different, and that difference, it appears from the whole phraseology of the agreement, was in the then contemplation of the parties. Much is directed to be done to facilitate the speedy progress of the suit; the usual formal and tedious mode of collecting testimony necessary to a correct decision upon the rights of the parties, is dispensed with, and the suits are to be brought to a close in a summary way, but no right is ceded, no title is relinquished by either party. On the contrary, we are told that the plaintiff is to recover, provided, and only provided, the chancellor shall so determine. The defendants concede to the plaintiff nothing, absolutely nothing. They, therefore, can have no equitable ground to claim from her an abandonment of her rights. The agreement that the bills be dismissed must be considered as referring to a mere voluntary dismissal by the plaintiff herself, which would leave her rights and interests untouched and unimpaired in all respects whatever.

This agreement is not so explicit as it might, and perhaps ought to have been, but, after mature consideration, I find enough in it to bring my mind satisfactorily to the conclusion that it can not be deemed a relinquishment of the plaintiff's right of dower in the Fountain Inn. The solicitors on both

sides have contended that it is entirely unambiguous; and yet they have had recourse to the proofs and circumstances to aid the interpretation respectively contended for. A few remarks upon those circumstances and proofs seem, therefore, to be required.

To the lease from the late husband of the plaintiff to Bryden, of the Fountain Inn, she made a formal relinquishment of dower. This lease did not expire until the twenty-sixth of February, 1821, some years after the commencement of the two former dower suits. This was an embarrassing circumstance. These defendants admit it to have been so considered at that time, for they say in their answer that, as they have been advised, the plaintiff's acknowledgment of the lease to Bryden did not operate as a bar of her dower, but merely as a suspension of execution during the term, and that the right to dower might have been determined in those suits. But, these defendants not satisfied with telling us of the advice they had obtained as to this apparent difficulty, have drawn forth that which was given to the plaintiff upon the same subject.

The policy of the law does not permit a solicitor to divulge the secrets of his client. Such confidential communications are not to be revealed at any period of time, either before or after the suit has been brought to an end, or in any other suit; for as to all such matters his mouth is shut forever: *Vaillant v. Dodemead*, 2 Atk. 524; *Sandford v. Remington*, 2 Ves. jun. 189; *Richards v. Jackson*, 18 Ves. 472; *Parkhurst v. Lowten*, 3 Madd. 121; *Arnot v. Biscoe*, 1 Ves. 95; *Wilson v. Bastall*, 4 T. R. 758; Bul. N. P. 284. A solicitor may refuse to act further for his client, but he can not go over to the opposite party: *Cholmondeley v. Clinton*, 19 Ves. 272. But this obligation of secrecy is the privilege of the client, not the incompetency of the solicitor. In this case the defendants have called on the plaintiff's solicitors to tell of their advice and opinions to their client; and the plaintiff has not objected. She has waived her privilege. Hence her solicitors are legal and competent witnesses. It appears by their depositions that their recollection of facts and occurrences which happened at the time of the agreement, about the two former dower suits, is very obscure and general. But there is no ambiguity in their letter of the twenty-eighth of September, 1816.

Their advice respecting this estate, called the Fountain Inn, is remarkable; it is expressed in these words: "We are of opinion you have no title of dower during Bryden's lease, having re-

linquished your dower therein during said lease, which will expire in 1821. Whether upon the termination of said lease you will be entitled to dower, is a question of some difficulty, and, perhaps, can only be solved by some further proof in point of fact relative to the nature and effect of the contract between the late Judge Chase and Bryden." And, after some further observations as to this contract, they say: "We do not think that this difficulty should prevent a settlement as to the residue of the property in which dower is asserted, in relation to which, we have reason to believe, no opposition will be made to your claim. If, before the lapse of five years, the question as to Bryden's property should not be settled, the question between you will be narrowed down to a single point, in the adjustment of which we suppose no great difficulty can take place." After the receipt of this advice the plaintiff signed the agreement S. M.

These circumstances and this letter fortify the construction I have put upon the agreement S. M. The plaintiff's agreeing to dismiss her bills, as to the Fountain Inn, and also to submit to the payment of costs, is satisfactorily accounted for. It thus clearly appears that, so far from relinquishing any right, she then merely withdrew from before the tribunal with a fixed resolution to return to the contest at a more convenient season, unincumbered with matters which might be then disposed of and finally adjusted.

It is, therefore, my opinion that within the institution and termination of those suits, nor the agreement, S. M., can in any manner whatever be considered as a bar or release of the right now asserted by this plaintiff.

The next question is, whether the late husband of the plaintiff had an estate in the Fountain Inn during their marriage of which she is dowable. It is admitted on all hands that the legal estate in fee-simple of this property was originally in Harry D. Gough; all who are in any way concerned in this controversy deduce their interests from him; and consequently the only question now is, whether James Clarke, to whom Gough conveyed, and the late Samuel Chase, to whom Clarke conveyed, held as mortgagees from Bryden or any one else; or, whether Clarke, and from him Chase, obtained an absolute indefeasible legal estate in fee-simple, or only an equitable interest.

It appears by the recitals in the conveyance dated the fourth of February, 1806, from James Clarke to the late Samuel Chase that Harry D. Gough, who was seised of an estate in fee-simple in the land covered by the Fountain Inn, had agreed to sell

it to Daniel Grant, and gave his bond with a condition to convey it to him when he paid the purchase-money. Grant sold his interest, and assigned this bond to James Bryden; and James Clarke and John Smith became Bryden's sureties for the payment of the balance of the purchase-money due to Gough, and also for the sum which he had agreed to pay Grant. Bryden paid and satisfied Grant in full. Then Clarke, it is said, at the request of Bryden, paid Gough seven thousand two hundred and sixteen dollars and forty-two cents, the amount then due to him, who thereupon conveyed the fee to Clarke, and Bryden delivered to Gough his bond. After which, at the request of Bryden, the late Samuel Chase paid Clarke the sum he had paid to Gough, and also paid to Bryden the sum of ten thousand two hundred and eighty-three dollars and fifty-eight cents, amounting altogether to the sum of seventeen thousand and five hundred dollars. Whereupon Clarke conveyed to Chase an absolute estate in fee-simple. On the twenty-sixth of the same month, in which Chase had obtained this conveyance, he leased the property to Bryden for the term of fifteen years, reserving an annual rent of two thousand dollars, to which lease Chase's wife, the present plaintiff, added her relinquishment of dower in the usual form. And on the same day on which the lease bears date, Chase executed his bond to Bryden, stipulating in the condition that if Bryden should pay him the sum of seventeen thousand five hundred dollars, at the expiration of fifteen years from that time, and not before, or within one year thereafter, and not afterwards, that then he, Chase, would reconvey the property called the Fountain Inn to Bryden. After which, on the second of April, 1811, Samuel Chase, junior, one of these defendants, proposed to purchase this property of the late Samuel Chase, and in that proposal he speaks of the dower of the present plaintiff as a then vested legal right. This proposal was matured, and the property was conveyed by the late Samuel Chase to this defendant, Samuel Chase, junior, in trust; or out of which he was to make provision for Matilda Ridgely and Ann Chase, two others of these defendants, and daughters of the late Samuel Chase.

It has been urged that Bryden always understood this contract between the late Samuel Chase and himself to be nothing more than a mortgage; and that he instituted a suit in this court to set aside this absolute conveyance from Clarke to Chase, and to be let in to redeem. It has also been urged that Samuel Chase, one of the present defendants, under a convic-

tion that Bryden had a good and available right, purchased his interest. This may be all true; but surely the assertions of Bryden, however solemn or formal, or the mere acts or allegations of any of these defendants, not responsive to the bill, can not be seriously regarded as a part of the legal and pertinent proofs in the case. Therefore, all these sayings and doings of Bryden and of these defendants, must be entirely put aside as foreign to the subject now under consideration. There is, then, in fact, no proof whatever in relation to the nature of the contract between the late Samuel Chase and James Bryden, other than that afforded by these several deeds and instruments of writing themselves.

The various contracts, made at different times, by the several parties concerned, from Gough to the late Samuel Chase, exhibit this matter in an obscure and circuitous form, from which it may be, in some degree, relieved and shortened without enfeebling the pretensions of either of the present parties, by regarding Gough, Grant, Clarke and Bryden as the persons who held the entire estate, legal and equitable; and as the grantors in fee-simple to the late Samuel Chase, for the consideration of seventeen thousand five hundred dollars. It is clear from the indenture of the fourth of February, 1806, that the late Samuel Chase obtained the whole and entire interest of all those persons, as well at law as in equity, and became thereby vested with an absolute estate in fee-simple. Because, it appears by the recitals of that deed, that he had paid Gough and Clarke for the legal interest they held; and that he had also paid for the equitable interest of Grant and Bryden. From this deed alone, therefore, there can be no doubt that the late Samuel Chase held an estate in fee-simple, of which this plaintiff is dowable.

But the bond of the twenty-sixth of February, 1806, it is said, shows that the previous contract, of the fourth of the same month, according to the true intention of the parties, is only to be regarded as a mortgage; that it is not, as it purports to be upon its face, an absolute sale; but a mere security for the loan of money from the late Samuel Chase to James Bryden. It is true, the court should, in cases of this nature, look into the various contemporaneous agreements and dealings between the parties to ascertain what was their design, and the real nature of their contract: *Sevier v. Greenway*, 19 Ves. 412.

This case is, however, susceptible of being still further simplified and reduced. Let it be supposed that Bryden had ob-

tained the entire estate in fee-simple from Gough, Grant and Clarke; and being so seised, that he alone was the grantor by the deed of the fourth of February. Then let this bond of the twenty-sixth of February, be considered together with or even as a part of that deed. The whole will read as an absolute sale, with nothing more than a condition for a repurchase.

That this whole transaction, from whatever point of view it may be contemplated, can only be considered as an absolute sale, with a condition or covenant for a repurchase, is manifest; because it wants all the usual badges and characteristics of a mortgage. The money paid was, so far as it appears, a fair price for the absolute purchase of such property; liable to much injury, requiring frequent repairs, and of fluctuating fashion and profits. Although Chase was not put into actual possession, yet Bryden leased from him, and held as his tenant. Chase received the rents and profits for his own use and benefit, and gave no account of them whatever. The chief value of this lot of land within the city of Baltimore, consisted in there being a large edifice erected upon it, which was occupied and used as a tavern, the loss of which, if destroyed by fire or otherwise, must have been borne by Chase, as it was held at his risk entirely: Co. Lit. 205; n. 1; Pow. Mort. 125, note P., and 138, note T. There was nothing of that reciprocity so essentially necessary to constitute a mortgage. It is as essential that the one party should have it in his power, at some specified time, to compel the repayment of the money, or to foreclose, as that the other should have it in his power to redeem. But although Bryden might repurchase for a stipulated sum at any time during the sixteenth year after the date of the contract, yet Chase could not compel Bryden to pay any sum of money at any time; Chase took no bond or other collateral security from Bryden; nor is there any clause in any deed or conveyance by which Bryden covenants or promises to pay Chase any sum of money. If the edifices had been destroyed, or the property had been ever so much reduced in value, Chase could have recovered nothing of Bryden. The contract is, therefore, utterly destitute of that mutuality always incident and necessarily belonging to a mortgage of any description: *Tasburgh v. Echlin*, Pow. Mort. 133; *Thornborough v. Baker*, 3 Swans. 631; *Goodman v. Greerson*, 2 Bal. & Bea. 279; *Robertson v. Campbell*, 2 Call, 421; *Roberts v. Cocke*, 1 Rand. 121. But it appears by the lease from Chase to Bryden, that this contract was, notwithstanding the bond, regarded as an absolute sale with a condition to repurchase, and

nothing more, by Bryden himself; for he obtained and accepted a relinquishment of the right of dower of the wife of Chase. And it appears from the proposals of Samuel Chase, one of these defendants, made on the second of April, 1811, that he also, then considered the contract as an absolute sale; for he speaks of this plaintiff's then existing right of dower.

Upon the whole, I am satisfied that the late Samuel Chase was seised of an estate in fee-simple in this property, of which the plaintiff, as his widow, is entitled to dower.

The next inquiry is, as to the extent of the recovery. Some of the authorities cited in reference to this branch of the case, related exclusively to the modern creatures of equity, called terms attendant upon the inheritance, which were not clearly recognized and defined in England until about the year 1670; and which have, so far as I can learn, never been introduced into this state, and are not likely to become fashionable among us. The equitable principles in relation to these attendant terms, and the distinctions between them and legal terms in gross are entirely foreign from the present subject of consideration.

The lease from Chase to Bryden created a legal term in gross; and the rent reserved was an annual rent service. It is this particular estate to which the acknowledgment of the plaintiff refers. Suppose the late Samuel Chase had previously to his marriage with the plaintiff executed such a lease as this to Bryden. How would the plaintiff's claim of dower have been affected? It is clear that a woman may be endowed of a rent service, rent charge, or rent-seck. And, to use the words of the most accurate and profound of the English lawyers: "If the husband maketh a lease for years, reserving rent, and taketh wife, the husband dieth, the wife shall be endowed of a third part of the reversion by metes and bounds, together with the third part of the rent, and execution shall not cease during the years:" Co. Lit. 32 a. But if a particular estate for years be carved out of the inheritance, prior to the marriage, without the reservation of any rent whatever, then the widow can only recover her dower in the reversion, with a *cesset executio* during the term: Pow. Mort. 687, note P. Hence it is certain that if this lease to Bryden had been made prior to the marriage, this widow would have been entitled to dower in the reversion, and in the rent immediately from the death of her husband.

The question then resolves itself into this: Has the plaintiff's acknowledgment placed her in the same, or in a different situa-

tion from that she would have been in, had the lease to Bryden been made before her marriage? At one time an opinion prevailed that a *feme-covert* could, in no way, bar or divest herself of her right of dower during her coverture. But, we are told, there can now be no question that if the husband and wife levy a fine, the wife is barred for two reasons: 1. Because the intermarriage and seisin are the fundamental causes of dower, and the death of the husband but as an execution thereof; 2. Because all those who have estate, or title, or claim, join in the assurance; and, therefore, in such case, if the husband and wife have made a lease rendering rent to the husband and his heirs, and afterwards the wife recovers dower, she shall hold it charged with the term; since it is a maxim that all lands in fee-simple may be charged in one way or other. But in such case as where the land had been thus charged before marriage, the wife would be dowable of the reversion and the rent: Co. Lit. 343; *Lampet's case*, 10 Co. 49. So, if the husband and wife join in levying a fine to affect a mortgage, and nothing more, the wife's interest will be affected to the extent of the mortgage, and no further. She will have a right to redeem, and may call on the personal representatives of her deceased husband to discharge the mortgage debt out of his personal estate, so as to free her dower from all incumbrance: Pow. Mort. 677, note D.

It may be regarded as a rule that the interest of a *feme-covert*, who joins in levying a fine, will be affected no further than according to the express intentions of the fine. Hence, if its only object be to improve the title and give additional security to the lessee for years, or mortgagee, her rights will be impaired in no respect not necessary for that purpose, and she will be allowed to take her dower in like manner as if such lease or mortgage had been made before the marriage. To prevent the creation of perpetuities it is laid down as a general rule of law in England that all lands may be charged or aliened in one way or other. The mode of conveyance must be adapted to the nature of the case; but if the proper method be pursued the alienation may, in most cases, be made effectual, whatever may be the nature of the estate or interest of the grantor. If it be an estate tail, it may be barred by a fine or common recovery; or if by reason of the peculiar nature of the estate, a fine can not be levied or a common recovery had, then a deed or common conveyance will be sufficient: *Otway v. Hudson*, 2 Vern. 584; *Moore v. Moore*, 2 Ves. 601; *Everall v. Smalley*, 1 Wils. 26. And in all cases a *feme-covert*, if she be of full age,

may alien her fee-simple estate, or relinquish her claim to dower by means of a fine. Fines were always binding upon married women, though it was thought proper to make them liable to examination by a statute of the year 1290: 18 Ed. I, stat. 4; Kilt. Rep. 146; but it was not merely by the examination that the fine had its efficacy: *Richards v. Chambers*, 10 Ves. 587. The mode of conveyance by fine is couched in the form of a suit upon an agreement; as to which the wife is examined by the judges of the court apart from her husband, so that it may appear to them that she perfectly understands what she is about to do, and freely gives her consent to it; and if they doubt of her age, they may examine her upon oath before they pronounce their judgment: 2 Inst. 515. Upon which a peculiar efficacy is ascribed to the agreement, so that it is not open to objections which would be fatal to an agreement of a married woman, authenticated in any other way, for there is no other form in which a court of common law can, with the consent of a *feme-covert*, give validity to her agreement concerning her estate; and there are few cases in which even a court of equity can, with her consent, enable her to dispose of her property, real or personal: *Richards v. Chambers*, 10 Ves. 580; *Ritchie v. Broadbent*, 2 Jac. & Walk. 456. This solemn and embarrassing mode by which alone married women are enabled to dispose of their rights and interests in real estate may have been, and may yet be, well suited to the circumstances and state of society in England; but it is obviously unsuited to the state of things in our country, and much more so formerly, when land titles were so frequently and informally transferred from one to another as to have been for some time among the most current instruments of traffic among the colonists than now, when real estates have become better settled and more permanently held: Land H. A. 77.

In Pennsylvania and many of the other colonies, it had become usual for married women to dispose of their lands, or to relinquish their right of dower by a common deed or instrument of writing, executed and authenticated as if they had been sole; which conveyances were afterwards confirmed, and the custom of making such deeds, with their consent, taken on a private examination, was adopted by legislative enactments: *Davey v. Turner*, 1 Dal. 11; *Lloyd v. Taylor*, Id. 17; *Watson v. Bailey*, 1 Binn. 470 [2 Am. Dec. 462]; *Jackson v. Gilchrist*, 15 Johns. 89. In Virginia, where the mode of conveyance by fine was never in use, following, as it would seem, a local custom of Wales, or of

London: Dyer, 363, b.; Crui. Dig., tit. Dower, c. 4, s. 15; it had become usual for married women, in order to effect a valid conveyance of their lands, or relinquishment of their dower, to make an acknowledgment of the deed in a private examination before the general or county court: 1 Virg. Stat. 145, note; which mode of conveyance was afterwards confirmed and adopted by the colonial legislature: 2 Virg. Stat. 317.

In Maryland, although it is said that lands were sometimes conveyed by fine passed in the provincial or county court: *Hammon's Lessee v. Brice*, 1 H. & McH. 323; or by common recovery: 1766, c. 21; yet it would seem that there had been many instances of conveyances made, in the form of mere common contracts, with intention to bind the interests of married women as if they had been sole, which were afterwards ratified and confirmed: 1671, c. 6; 1694, c. 11; Land H. A. 214. But it appears that the provincial legislature of Maryland, at a very early period, made provision for quieting possessions and establishing the manner of conveying lands by deed acknowledged and recorded, 1663, c. 7, and prescribed that form of private acknowledgment of conveyances of real estate and relinquishment of dower from *femes-covert*: 1674, c. 2, s. 5; 1692, c. 30, s. 5; 1699, c. 42, s. 6; which has been re-enacted and continued in force from that time forward by the now existing law: 1715, c. 47; *Rhea v. Rhenner*, 1 Peters, 105. Since the passage of which law the method of conveyance by fine has been disused, and, indeed, may be now considered as having sunk into total oblivion: *Hammond's Lessee v. Brice*, 1 H. & McH. 323; Kilt. Rep. 146.

The acknowledgment of a *feme-covert* to a deed, as prescribed by the act of assembly, it is obvious, was introduced as a substitute for a fine; and although a deed of bargain and sale so acknowledged will not, like a fine, as relates to the interests of third persons, work a discontinuance, *Lawrence v. Hiestler*, 3 H. & J. 377; *Mayson's Lessee v. Sexton*, 1 H. & McH. 275; *Nicholson's Lessee v. Hemsley*, 3 H. & McH. 409, yet, as regards the *feme-covert* herself, it, as effectually and to a like extent, passes her interest as a fine: *Colegate D. Owing's case*.¹ Hence, an acknowledgment of a *feme-covert*, made according to the act of assembly, like that made on levying a fine, can operate only so far and no farther than the deed itself, to which it is annexed, would operate according to its nature, supposing it

1. 1 Bland's Ch. 370 [17 Am. Dec. 311].

to have been made by the husband before the marriage, or by herself alone while sole.

It is, therefore, my opinion that the acknowledgment of this plaintiff to the lease to Bryden can only be construed as an improvement, and further security to Bryden's title; and that on the death of Samuel Chase the plaintiff became immediately entitled to dower in the reversion of the Fountain Inn; and also in the rent reserved by that lease, without delay of execution during the term. At law the widow can recover damages or mesne profits for the detention of her dower only from the time it was actually demanded of the heir. And if the jury fail to assess damages for the detention she can recover no costs, because costs are given only where damages are recovered: *William v. Gwyn*, 2 Saund. 45, note; Pow. Mort. 718, note P.; 2 Harr. Ent. 698. But in equity it is otherwise; here it is the course of the court to assign her dower, and universally to give her an account of the rents and profits from the death of her husband. But where the heir throws no difficulties in her way, and admits her claim, she has no costs: *Curtis v. Curtis*, 2 Bro. C. C. 632; *Dormer v. Fortescue*, 3 Atk. 130. In this case, however, it appears that every possible opposition has been made to this plaintiff's claim: *Lucas v. Calcraft*, 1 Bro. C. C. 134; *Worgan v. Ryder*, 1 Ves. & Bea. 20; 2 Madd. Ch. 564. As to the value of the rents and profits, one third of the rent reserved by the lease to Bryden, and no more, can be recovered during that term. After that time the actual value must be the criterion. For, as it is said, if a wife be entitled to dower of land worth no more than five dollars per acre, and the heir by his industry or by building thereon makes it worth fifty dollars per acre, the widow shall have her dower according to the improved value. So, on the other hand, if the property be impaired she can recover only according to the reduced value: Co. Lit. 32, a. But the heir is entitled to no allowance for meliorations and improvements. The account of the rents and profits must be taken according to these principles. Interest must be allowed on the rent from the time it became due or was actually paid by the tenant, as it shall appear: *Tew v. Winterton*, 1 Ves. jun. 461; *Baird v. Bland*, 5 Mun. 492; *Davis v. Walsh*, 2 H. & J. 344.

There is yet one other branch of this case to be disposed of. The plaintiff prays that the two thirds of this property not covered by her claim may be sequestered or sold to satisfy the amount which may be awarded to her for rents and profits. I

have been referred to no authority which would warrant a sequestration or sale as prayed; nor do I know that there is any such authority to be found. Perhaps the power to sequester might have been thought to rest upon principles similar to those on which I founded the order appointing a receiver. The cases are, however, widely different. The sole object of appointing a receiver is to take care of the subject about which the parties are contending, and to prevent it being wasted or lost. Such an appointment involves a decision upon no right, and can not affect any point in controversy. But a sequestration, or sale, makes a temporary or a total disposition of the property, which can be done in no instance where the matter is not put in issue by the nature of the case, and a sequestration or sale is not expressly authorized. From the nature of the decree here called for, the title of the defendants and their enjoyment of the two thirds must be left undisturbed. It is their property, but, like any other property belonging to them, it will be subject to seizure and sale under a *fieri facias*, upon a decree commanding them to pay the plaintiff a specified sum of money should they fail to comply. These prayers of the plaintiff must, therefore, be rejected.

There may be some difficulty in assigning the plaintiff dower in this property, owing to its peculiar nature. It is represented to be a large and valuable edifice, chiefly or altogether occupied as a tavern; and it may turn out, upon inquiry, that it is incapable of being advantageously occupied in any other way, or, perhaps, of being divided at all. A rent may be given for equality of partition or in lieu of dower, which in its nature will be distrainable of common right: Co. Lit. 144, 169; *Turney v. Sturges*, Dyer, 91; *Dacre v. Gorges*, 2 Sim. & Stu. 454; Com. Dig., tit. Annuity, A. 3; *Warfield v. Warfield*, 5 Harr. & J. 459. I shall, therefore, in the decree appointing the commissioners to lay off and assign the plaintiff's dower in this property, leave sufficient latitude for them to report specially all circumstances, and also in the alternative, so that the final decree may be adjusted to suit the case after the parties have been heard. As to the rents and profits, the case will be sent to the auditor.

Decreed, that the said Hannah K. Chase, the plaintiff, is entitled to dower in all that messuage, tenement and lot of land in the proceedings mentioned, called the Fountain Inn. And to the end that this court may be enabled to make a just assignment to the plaintiff of her dower in the aforesaid messuage,

lands and tenements, it is ordered that a commission issue to Benjamin C. Ridgate, William Magruder, James Mosher and Robert C. Long, of the city of Baltimore, authorizing them or any three of them to go upon, walk over, survey, lay off and designate one third part of the said premises as and for the dower of the said plaintiff in the same; and that the said commissioners be directed in the commission to make out a plat and certificate, exhibiting an accurate description of the third part or dower so by them laid out. And if they shall be of opinion that the said messuage and lot of land cannot be divided, in the manner which they shall so specify, without injury to the same and disadvantage to the parties, they shall express their reasons for such opinions, state all circumstances they may deem material, and proceed to designate and describe specially in what other manner the said plaintiff may be endowed of the said property, without any or with less injury thereto, and without any or with less disadvantage to all concerned. And the said commissioners shall make return of their proceedings to this court as soon as may be, subject to its further order upon the same. And to the said commission there shall be annexed the usual oath of office.

And it is further decreed that the defendants, Samuel Chase, Matilda Ridgely and Ann Chase, pay unto the said Hannah K. Chase, the plaintiff, one third part of the rent reserved by the lease to the said James Bryden, from the nineteenth of April, 1811 (the day of the death of the said late Samuel Chase), until the expiration of the said lease; and, further, that the said defendants pay unto the said plaintiff one third part of the rents and profits of the said property in the proceedings mentioned, from the termination of the said lease until the time of the said plaintiff's being put into possession of her dower in the said premises.

And for the purpose of having an account taken of the said rents and profits, it is further decreed that this case be and the same is hereby referred to the auditor, with directions to state an account or accounts from the proceedings and proofs in the case, or from such other testimony as may be laid before him by the parties. And it is further ordered that each party, on giving to the other, or her, or their solicitor, three days' notice as usual, be, and they are hereby authorized to have testimony taken before the commissioners appointed to take testimony in the city of Baltimore, in relation to the rents and profits of the premises, to be used before the auditor and the court, provided

it be taken and filed with the register on or before the first day of June next.

ABSOLUTE DEED AND AGREEMENT TO RECONVEY.—Where one conveys land to another by an absolute deed, and takes back a bond or other agreement for the reconveyance of the same land at a future day, on the payment of a sum of money, or the performance of some other act, it is often a matter of great difficulty for the court to determine whether it is a case of mortgage or of conditional sale. It is undeniable that there may be, on the one hand, a valid mortgage, although the defeasance may be contained in a separate instrument: 4 Kent's Com. 141; and, on the other, a *bona fide* sale with a condition for the repurchase of the property: *Conway v. Alexander*, 7 Cranch, 237; *Spence v. Steadman*, 49 Ga. 138. The difficulty is to fix upon some decisive test or criterion, by which to determine whether a particular transaction belongs to the one class or to the other.

INTENTION OF THE PARTIES GOVERNS.—Since contracts of mortgage and of absolute sale, with a condition for repurchase, are both perfectly legal and valid, the obvious method of determining to which class a particular contract belongs is by ascertaining what the parties intended. In every lawful contract the intention of the parties must govern, if it can be determined what that intention was. In a particular case, if the parties intended to make such a contract as the law denominates a mortgage, so it will be; but if they intended an absolute sale, or a sale with an agreement for a future resale, that intention will be carried into effect if it is made clearly to appear: *Henley v. Hotaling*, 41 Cal. 22; *Hughes v. Sheaff*, 19 Iowa, 335; *Cornell v. Hall*, 22 Mich. 377; *Burnside v. Terry*, 46 Ga. 621. "Contracts for repurchase made contemporaneously with conveyances of real estate, absolute in form, are sometimes strong evidence tending to show the conveyances are intended to be mortgages; but where it appears the parties really intend an absolute sale and a contract allowing the vendor to repurchase, such intention must control:" *Hanford v. Blessing*, 80 Ill. 188. If the instrument declares itself to be a conditional deed, it will ordinarily be so construed: *Burnside v. Terry*, 45 Ga. 62. So a provision in a bond, that it shall be considered a contract to convey, will be regarded as of great importance in determining the nature of the transaction: *Ford v. Irwin*, 18 Cal. 117. But the intent which governs in such cases, particularly in courts of equity, is that which concerns the substance of the transaction, and not merely the form of the instrument: *Spence v. Steadman*, 49 Ga. 133. Indeed, if the form of words used were the decisive criterion, needy debtors would find but poor protection in courts of justice against the exactions of grasping creditors. This subject is very clearly presented in the opinion of Robertson, C. J., in *Edrington v. Harper*, 3 J. J. Marsh. 353. He says: "It is often very difficult to distinguish between mortgages and conditional sales. Every case must be determined by a consideration of its own peculiar circumstances; and it is proper that no specific rules should be defined for distinguishing mortgages from conditional sales, otherwise the usurer, with the rules before him, would be able to evade the laws against usury, and oppress the necessitous with impunity. But in all doubtful cases the law will construe the contract to be a mortgage, because such a construction will be most apt to attain the ends of justice, and prevent fraud and oppression: See *Skinner v. Miller*, 5 Litt. 86. The execution of a defeasance, simultaneously with the absolute conveyance, constitutes them, in contemplation of law, one entire instrument, as much as if the defeasance

had been incorporated in the conveyance, and will generally have the effect of making the contract a mortgage: Pow. on Mortg. 67.

"It is a general rule, that 'where land is conveyed absolutely, and the grantee, by a separate instrument or defeasance, covenants to reconvey to the grantor, on his paying a certain sum of money, the transaction amounts only to a mortgage:' *Peterson v. Clark*, 15 Johns. 205; *Dey v. Dunham*, 2 Johns. Ch. 189. Where A. gave a regular bill of sale of three horses to B., for the consideration of two hundred dollars, and B. at the same time gave A. a writing or defeasance, engaging on the payment of two hundred and ten dollars to him by A. in fourteen days, to deliver the horses to A., it was held that this was a mortgage: *Brown v. Bement*, 8 Johns. 96.

"From this general rule of construction there are exceptions. The intention of the parties is the only true and infallible test; that intention is to be collected from the condition or conduct of the parties, as well as from the face of the written contract. Parol evidence is not admissible to contradict the writing; but when the chancellor is asked to assist the vendee in enforcing (as in this case) an alleged equity, a rebutting equity may be proved by parol testimony; and even when the vendor is the complaining party, proof of the conduct and condition of the parties may be admitted to aid in giving construction to a writing which may be of doubtful import on its face. Parol evidence is always admissible to prove fraud, or usury, or the illegality of the contract, or the consideration. The fact that the real transaction between the parties was a borrowing and lending will, whenever or however it shall appear, show that a deed, absolute on its face, was intended as a security for money; and, whenever it can be ascertained to be a security for money, it is only a mortgage however artfully it may be disguised."

IF INTENDED AS A SECURITY IT IS A MORTGAGE.—It is clear from what is said in the opinion just quoted, that a deed absolute on its face, with a separate contract for a reconveyance at a future time, if intended merely as a security for a pre-existing debt or a present loan, will be construed a mortgage, particularly in a court of equity; this, too, whatever may be the form of words used. Says McMillan, J., in *Hill v. Edwards*, 11 Minn. 22: "As to what constitutes a mortgage, the law is so well settled as to obviate any necessity of discussing the question. The particular form of words of the conveyance is unimportant, and it may be laid down as a general rule subject to few exceptions, that whenever a conveyance, or assignment or other instrument transferring an estate, is originally intended between the parties as a security for money, whether this intention appear from the same instrument or from any other, it is always considered in equity a mortgage." "It matters not," says Dixon, C. J., in *Knowlton v. Walker*, 13 Wis. 264, "what peculiar form the instrument evidencing the transaction may have taken, the substance of the inquiry always is, was it a security for the loan of money or other property?" This doctrine is very forcibly stated by Huston, J., in delivering the opinion of the court in *Kerr v. Gilmore*, 6 Watts, 405. After reviewing a number of cases, he says:

"The result of these cases seems to be, that if the agreement is in substance a loan of money, no management or contrivance of the lender, no form of expression in the instruments, not even dating the defeasance several days after the deed, not even the lender uniformly stating that he will not have a mortgage, will avail. A sale in form, but which in fact and substance may be avoided by the payment of money within a given time, is and will be held to be a mortgage, until lapse of time or some other matter changes it.

"In different cases, we find different particulars stated as being *criteria*, by

which to distinguish whether the instrument be a mortgage or an absolute sale. Each of these may have weight, but it is not safe to designate the insertion or omission of any one clause or circumstance as conclusive, for that would be adopted by the rapacious, and submitted to by the needy, and the wholesome rules now established would become useless. The cases, however, seem to admit the possibility of a deed absolute on its face, and a defeasance agreeing to reconvey if the money be paid on a certain time, and that the latter may be unavailing, unless the money be paid at the time specified. This, however, can, as I apprehend, only occur where the contract and conveyance were clearly for an absolute sale, and the agreement to reconvey a subsequent and distinct matter, not in the contemplation of the parties when the sale was made and deed delivered. In such case, the agreement to reconvey will amount only to an executory agreement to sell, on which the covenantee may have an action.

“The authorities, however, say that even when the matter assumes this appearance, the courts are bound to scrutinize the transaction with great care, and to be watchful that it was not originally a loan of money; and when we consider that many of those who lend are astute to devise some mode by which to become absolute owners, if the money be not repaid at the day, this caution would seem to be necessary.”

The gist of the inquiry in every case is, therefore, as stated by Dixon, C. J., in *Knowlton v. Walker*, 13 Wis. 264, referred to above: Was the conveyance intended as a security, and the contract to reconvey as, in substance, a defeasance? If so, it is a mortgage: *Erskine v. Townsend*, 3 Am. Dec. 71; *Dunham v. Dey*, 8 Id. 282; *Clark v. Lyon*, 46 Ga. 202; *Tillson v. Moulton*, 23 Ill. 648; *Preschbaker v. Feaman*, 32 Id. 475; *Ewart v. Walling*, 42 Id. 453; *Klock v. Walter*, 70 Id. 416; *Harbison v. Lemon*, 3 Blackf. 51; *Watkins v. Gregory*, 6 Id. 113; *Crassen v. Swoveland*, 22 Ind. 427; *Montgomery v. Chadwick*, 7 Iowa, 114; *Enos v. Sutherland*, 11 Mich. 538; *Weide v. Gehl*, 21 Minn. 449; *Archambau v. Green*, Id. 520; *Wilson v. Drumrite*, 21 Mo. 325; *Tibeau v. Tibeau*, 22 Id. 77; *Copeland v. Yoakum*, 38 Id. 349; *Sharkey v. Sharkey*, 47 Id. 543; *O'Neill v. Capelle*, 62 Id. 202; *Clark v. Henry*, 2 Cow. 324; *Lane v. Shears*, 1 Wend. 433; *Brown v. Dean*, 3 Id. 208; *Glover v. Payn*, 19 Id. 518; *Mason v. Hearne*, Busb. Eq. (N. C.) 88; *Robinson v. Willoughby*, 65 N. C. 520; *Marshall v. Stewart*, 17 Ohio, 356; *Johnston v. Gray*, 16 Serg. & R. 361; *Friedley v. Hamilton*, 17 Id. 70; *Colwell v. Woods*, 3 Watts, 188; *Guthrie v. Kahle*, 46 Pa. St. 331; *Houser v. Lamont*, 55 Id. 311; *Baxter v. Dear*, 24 Tex. 17; *Klinck v. Price*, 4 W. Va. 4; S. C., 6 Am. Rep. 268; *Second Ward Bank v. Upmann*, 12 Wis. 499; *Plato v. Roe*, 14 Id. 453; *Brinkman v. Jones*, 44 Id. 498; *Woodward v. Pickett*, 8 Gray, 617; *Bayley v. Bailey*, 5 Id. 505; *Campbell v. Dearborn*, 109 Mass. 130; S. C., 12 Am. Rep. 671; *Dow v. Chamberlin*, 5 McLean, 281; see also the note to *Thornbrough v. Baker*, 2 Lead. Cas. in Eq., 1081, *et seq.*; and 1 Hilliard on Mortgages, 96, *et seq.* The existence of a debt, and an intention to secure it, is the distinguishing test: 1 Jones on Mort., sec. 265.

THE RULE AT LAW AND IN EQUITY is the same in this respect. In both forums the intention of the parties, that the conveyance is to stand merely as a security for a debt, stamps it infallibly as a mortgage: *Tillson v. Moulton*, 23 Ill. 648. The only difference is as to the means by which this intention is required to be manifested. At law it must appear upon the face of the transaction that the instrument relied on as a defeasance was intended as such, while in equity, parol evidence may be made use of to discover the real intent. The rule in equity is more liberal in favor of the mortgagor than the rule of law,

and if from the writings themselves, and from parol evidence of the nature of the transaction, it is ascertained that the object of the conveyance was to furnish security for a debt, it will be pronounced a mortgage in a court of chancery: *Heath v. Williams*, 30 Ind. 495; *Adams' Equity*, 111; *Willard's Eq. Jur.* 432. Indeed, in doubtful cases, equity generally prefers to construe an instrument a mortgage, rather than an absolute conveyance with a separate contract for a repurchase: *Dougherty v. McColgan*, 6 Gill. & J. 275; *Trucks v. Lindsay*, 18 Iowa, 504; *Cornell v. Hall*, 22 Mich. 377; *Flagg v. Mann*, 2 Sumn. 486.

REQUISITES OF GOOD DEFEASANCE.—The rule at law, as to what is necessary to constitute a separate defeasance, so as to turn an absolute conveyance into a mortgage, is thus stated by Tenney, C. J., in *Shaw v. Erskine*, 43 Me. 371: "To make a good defeasance it must be by deed. It must recite the deed it relates to, or, at least, the most material part thereof. It is to be made between the same persons that were parties to the first deed. It must be made at the time, or after the first deed and not before. It ought to be made of a thing defeasible." To the same effect is *Murphy v. Calley*, 1 Allen, 107. Courts of equity, however, are not hampered by these technical rules, but look through the forms used to the real nature of the transaction. The question of mortgage or no mortgage thus depends upon the circumstances of each particular case: *Rich v. Donne*, 35 Vt. 125.

WRITING NOT UNDER SEAL.—From what has already been said, it is clear that at law a written promise of reconveyance, which is not under seal, does not constitute a good defeasance of a deed. This is well settled in several of the states: *Kelleran v. Brown*, 4 Mass. 453; *Scituate v. Hanover*, 16 Pick. 222; *Runlet v. Otis*, 2 N. H. 167; *Jewett v. Bailey*, 5 Greenl. 87; *French v. Sturdivant*, 8 Id. 246; *Warren v. Lovis*, 53 Me. 463. But it was said in *Kelleran v. Brown*, 4 Mass. 453, and *French v. Sturdivant*, 8 Greenl. 246, that a written promise not under seal was deemed sufficient in England. In equity, at least, it is not necessary that the promise to reconvey should be under seal: *Kelleran v. Brown*, 4 Mass. 443; *Eaton v. Green*, 22 Pick. 526; 4 Kent Com. 142; 1 Jones on Mort., sec. 244.

PARTIES MUST BE THE SAME.—One of the requisites of a good defeasance, as stated above, is that it shall be between the same parties as the original conveyance. The necessity of this is insisted on in many cases: *Flagg v. Mann*, 14 Pick. 480; *Treat v. Strickland*, 23 Me. 234; *Shaw v. Erskine*, 43 Id. 371; *Warren v. Lovis*, 53 Id. 463. Thus it was held in *Treat v. Strickland*, 23 Me. 234, that a bond by the grantee in a deed to reconvey to the grantor and another, did not constitute a valid defeasance. But it was held in *Mills v. Darling*, 43 Me. 565, that where the conveyance was made by a husband and wife, a bond to reconvey, executed to the wife alone, would be a sufficient defeasance. In this respect also the rule in equity is more liberal than that at law. Thus, in *Weed v. Stevenson*, Clarke's Ch. (N. Y.) 166, it was decided that a defeasance executed to another person than the grantor in the original deed would suffice to turn the transaction into a mortgage. Here, also, equity looks to the substance of the transaction, and will often pronounce a conveyance a mortgage, where the parties to it are apparently not the same as those who executed the instrument relied on as a defeasance. Thus, where a purchaser of land, in order to induce a third person to advance the money to make the purchase, causes the vendor to make the conveyance to such third person, and takes a bond to himself from such third person for the reconveyance of the land, the two instruments, though not on their face between the same parties, nevertheless constitute a mortgage: *Mason v. Hearne*, Busb. Eq.

(N. C.) 88. In such a case the transaction is in substance between the same parties throughout.

MUST BE DELIVERED AT THE SAME TIME.—It is another of the requisites of a valid defeasance at law, that it must be executed or delivered at the same time as the original conveyance. They must operate simultaneously to constitute a mortgage. It is a common maxim: Once a mortgage always a mortgage: *Clark v. Henry*, 2 Cow. 324; and the converse is equally true. If a conveyance once takes effect as an absolute deed, it can not at law be turned into a mortgage by a subsequent defeasance. The defeasance must operate if at all simultaneously with the deed: *Lund v. Lund*, 8 Am. Dec. 29; *Bodwell v. Webster*, 13 Pick. 411; *Freeman v. Baldwin*, 13 Ala. 246; *Cotton v. McKee*, 68 Me. 486; *Vasser v. Vasser*, 23 Miss. 378; 1 Jones on Mort., sec. 245, 246, 257. But if the two instruments were in fact executed or delivered at the same time, although they bear different dates, they will constitute a mortgage: *Harrison v. Trustees of Phillips Academy*, 12 Mass. 456; *Blaney v. Bearce*, 2 Greenl. 132. Where there is a connected series of acts having in view the one purpose of furnishing security for a debt, the bond, though subsequently executed, will relate back to the deed, and constitute it a mortgage: *Scott v. Henry*, 13 Ark. (8 Eng.) 112; *Walker v. Tiffin etc., Mining Co.*, 2 Col. 89. The rule in equity in this particular also is less stringent than that at law: 1 Jones on Mort., sec. 257. If the deed was, in fact, intended at the time as a security, although the bond was not executed until afterwards, it will constitute the transaction a mortgage. Thus, where there was a verbal agreement at the time of executing the deed, that the grantee should subsequently give a bond to reconvey, and the bond was afterwards given pursuant to the agreement, it was held that the bond took effect by relation, and made the deed a mortgage: *Lovering v. Fogg*, 18 Pick. 540; but see, to the contrary: *Lund v. Lund*, 8 Am. Dec. 29.

IF A DEED AND BOND TO RECONVEY ARE SIMULTANEOUSLY executed, it is held in some cases that the transaction is necessarily a mortgage: *Colwell v. Woods*, 3 Watts, 188; *Kerr v. Gilmore*, 6 Id. 405; *Brown v. Nickle*, 6 Pa. St. 390; *Wilson v. Shoenberger*, 31 Id. 295; 1 Jones on Mort., sec. 248. That it will generally be so construed seems scarcely to admit of a question: *Taylor v. Weld*, 5 Mass. 109; *Newhall v. Burt*, 7 Pick. 156; *Nugent v. Riley*, 1 Met. 117. But the better doctrine certainly is that a contemporaneous deed and bond to reconvey on payment of a sum of money, do not even in equity necessarily constitute a mortgage; but that the construction of the contract depends upon the question whether or not security for a debt was intended: *Hicks v. Hicks*, 5 Gill. & J. 75. Indeed, it was held in *Henley v. Hotelling*, 41 Cal. 26, a well considered case, that a deed, absolute in form, should not be turned into a mortgage, even by a contemporaneous bond to reconvey, without clear proof that such was the intention of the parties. Mr. Chief Justice Rhodes, delivering the opinion of the court, said:

“When the intention of the parties to a deed, absolute in form, is sought to be ascertained, not in the usual way, by reading and construing the instrument, in connection with evidence to identify the subject-matter, the parties, etc., but by evidence to establish an equity beyond and outside of the deed, and thus to convert the deed into a mortgage, the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage, otherwise the intention appearing on the face of the deed ought to prevail. There can be no question that a party may make a purchase of lands, either in satisfaction of a precedent debt or for a consideration then paid, and may at the same time contract to reconvey the lands upon the pay-

ment of a certain sum, without any intention on the part of either party that the transaction should be, in effect, a mortgage. There is no absolute rule that the covenant to reconvey shall be regarded either in law or equity as a defeasance. The covenant to reconvey, it is true, may be one fact, taken in connection with other facts, going to show that the parties really intended the deed to operate as a mortgage, but, standing alone, it is not sufficient to work that result. The owner of the lands may be willing to sell at the price agreed upon, and the purchaser may also be willing to give his vendor the right to repurchase upon specified terms; and if such appears to be the intention of the parties, it is not the duty of the court to attribute to them a different intention. Such a contract is not opposed to public policy, nor is it in any sense illegal; and courts would depart from the line of their duties should they, in disregard of the real intention of the parties, declare it to be a mortgage. 'To deny the power of two individuals,' says Chief Justice Marshall, 'capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of the right to repurchase the same land, at a fixed price and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as infants.' *Conway's Executors v. Alexander*, 7 Cranch, 237.

"Conceding to parties the right to contract in that manner, it necessarily follows, that something more than a reservation of the right to repurchase, or a covenant to reconvey, must be shown in order to convert an absolute deed into a mortgage. There is one fact which is indispensable for this purpose. A mortgage is a security for the performance of an agreement, which is usually to pay a sum of money. Leaving out of view other agreements than those for the payment of money, it is essential that there be an agreement, either express or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money. If there is no debt there is no mortgage."

Where the deed and bond to reconvey are not executed at the same time, it is still more clear that the determination of the question, whether they constitute a mortgage or not, depends upon the intention of the parties, as ascertained from the circumstances: *Kerr v. Gilmore*, 6 Watts, 405; *Kelly v. Thompson*, 7 Id. 401; *Wilson v. Shoenberger*, 31 Pa. St. 295; *Baisch v. Oakeley*, 68 Id. 92; *Haines v. Thomson*, 70 Id. 434. In *Wilson v. Shoenberger*, 31 Pa. St. 295, it was laid down that if the deed and bond were executed at the same time, the question as to whether the transaction was a mortgage or a sale was one of law for the court; but that if the bond was executed subsequently to the deed, the question was largely one of fact for the jury. The intention to convey the property as security for a loan, must clearly appear to make the deed a mortgage. Hence, in *Kelly v. Thompson*, 7 Watts, 401, where it appeared that the bond was executed five days after the deed, there being no evidence of a loan, it was held that the bond was an independent contract.

PAROL EVIDENCE is certainly admissible in equity to show the connection between a deed absolute in form, and a separate defeasance, and that the transaction is in reality a mortgage and not a sale: *Tillson v. Moulton*, 23 Ill. 648; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Haines v. Thomson*, 70 Id. 434; *Gay v. Hamilton*, 33 Cal. 686; *Brown v. Holyoke*, 53 Me. 9; or to show that an instrument executed as a defeasance has been lost or destroyed: *Marks v. Pell*, 1 Johns. Ch. 594. But, of course, where the deed and bond on their face constitute a mortgage, parol evidence is inadmissible to prove the contrary: *Snyder v. Griswold*, 37 Ill. 216. So in those states where a deed and bond to

reconvey, executed on the same day, are held necessarily to constitute a mortgage, parol evidence is not admissible to show that a conditional sale was, in fact, intended: *Brown v. Nickle*, 6 Pa. St. 390; *Haines v. Thomson*, 70 Id. 434.

OTHER REQUISITES.—In order to constitute a defeasance, the instrument must be absolutely delivered as such. If it is deposited with a third person as an escrow, to be delivered to the obligee in case of payment of the money within a certain time, and the money is not paid, there is no mortgage: *Bodwell v. Webster*, 13 Pick. 411; *Glendenning v. Johnston*, 33 Wis. 347. And, further, the agreement to reconvey must be absolute. If the obligor's contract is optional, either to convey the land or to pay a sum of money, it is no mortgage: *Fuller v. Pratt*, 10 Me. 197.

No collateral promise or covenant to repay the purchase-money is necessary to constitute a deed and bond to reconvey a mortgage: *Rice v. Rice*, 4 Pick. 349; *Wharf v. Howell*, 5 Binn. 499; *Jaques v. Weeks*, 7 Watta. 261. A condition in the defeasance, that it shall be void if the money is not paid within a given time, constitutes the transaction none the less a mortgage: *Jaques v. Weeks*, 7 Watts, 261. But a defeasance expressing an illegal condition is void: *Patterson v. Donner*, 48 Cal. 369.

INSOLVENCY AS GROUND FOR APPOINTING A RECEIVER.—In *Blain v. Everett*, 26 Md. 73, it was held that the doctrine laid down in the principal case, that the insolvency of one who is in the receipt of the rents and profits of an estate in litigation, is a sufficient ground for the appointment of a receiver, did not apply where a landlord had neglected to take the proper legal steps to terminate the tenancy of an improvident and insolvent tenant, at the expiration of his lease, and a bill in equity was filed to get possession of the premises.

GIBSON v. TILTON.

[1 BLAND'S CH. 352.]

ON MOTION TO DISSOLVE AN INJUNCTION, all objections to the sufficiency of the answer will be considered.

IF THE ANSWER DENIES THE FACTS upon which the plaintiff's equity rests, the injunction must be dissolved.

AFFIDAVIT MADE IN ANOTHER STATE verifying an answer in a suit brought in this state is not within the act of congress regulating the authentication of judicial proceedings in other states.

SUCH AFFIDAVIT, IF MADE BEFORE A MAGISTRATE duly authorized to administer an oath by the laws of the state where it was taken, is admissible here, and is considered as having been taken under the authority of the court in which the suit is pending.

TAKING OF DEPOSITIONS AND AFFIDAVITS IN ONE STATE in aid of judicial proceedings pending in another, rests upon a principle of comity between the states.

PARTY MAKING A FALSE AFFIDAVIT ABROAD for use in judicial proceedings here, can not be prosecuted criminally in this state, but a party using such affidavit, knowing its character, may be punished for practicing an imposition upon the court.

MOTION to dissolve an injunction granted on the filing of the plaintiff's bill. The defendant filed the present motion on

putting in his answer, denying all the equities of the bill. The plaintiff objected to the answer as insufficient, on grounds which sufficiently appear from the opinion.

BLAND, Chancellor. This motion for a dissolution of the injunction standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

It appears that the defendant is a resident of the state of Delaware, where, after subscribing his name to his answer, he swore to its truth, which acts are certified by the judge in these words: "Sworn and subscribed this twenty-sixth day of April, A. D. 1827, before Kensey Johns, chief justice of the supreme court of the state of Delaware." To which is subjoined a certificate in the usual form by the clerk of New Castle county, in the state of Delaware, that Kensey Johns was then chief justice.

It was objected that the answer was insufficient; was not properly sworn to; and that the certificate was not in the form prescribed by the act of congress of the twenty-sixth of May, 1790, c. 11, prescribing the mode of authenticating records and judicial proceedings from the other states of the Union. In answer to which it was urged that the answer was entirely sufficient, and that the latter objections could not now be made. On the hearing of a motion to dissolve an injunction, objections of every kind to the answer may be made, and are then in order. Because the motion itself, in its very nature, is founded upon the correctness and sufficiency of the answer in every particular. Hence, the plaintiff may, on the very day of hearing the motion, file exceptions to the answer, and have them then heard and decided upon. The defendant can have no cause to complain of surprise, because, by his motion, he calls upon the plaintiff to show cause why, after having well and sufficiently answered the bill, the injunction should not be dissolved. And having thus planted himself upon the sufficiency of his answer at that time, and for that purpose, he stands pledged to sustain it in all respects; or he must fail in his motion: *Eden, Inj. 78; Alexander v. Alexander, MS., thirteenth December, 1817.* All the objections that have been made are, therefore, now in season, and must be decided upon.

The act relied upon to show the insufficiency of the certificate is one of those laws passed by congress, in pursuance of the power delegated to them by the first section of the fourth article of the constitution of the United States. That delegation of power enables congress to prescribe the manner in which the

public acts, the records and the judicial proceedings of every other state shall be proved, and the effect thereof in this state; but the affidavit and certificate appended to this answer are not in any sense public acts, records or judicial proceedings of Delaware. They are parts of a judicial proceeding of Maryland; such as have been called for and authorized by the usage and law of Maryland, not of Delaware.

According to the long established practice of this court in various cases, some of which have been recognized by legislative enactments: 1797, c. 114, s. 5; it will act upon the evidence derived from affidavits taken in a foreign country. Prior to the revolution a *dedimus* was always sent to obtain an answer from a defendant resident in any of the neighboring colonies or in a foreign state: Chan. Pro., lib. D. D., No. J., folios 6, 59, etc.; and now commissions are often sent to other states of this Union: *Hunt v. Williams*, Taylor, 318; and into foreign nations to take testimony, where the commissioners must be sworn by some magistrate of the place, before they can proceed to act. So an affidavit verifying the truth of an answer, made before a magistrate duly authorized to administer an oath in the country where the respondent resides, has long been admitted as sufficient. The acts of foreign magistrates in all such cases are, however, considered as having been done under the authority of this court, and as deriving their sanction from the judicial power of this state, not from that of a foreign state; for, standing unconnected in the foreign state, with that to which they relate here, they would be there wholly unintelligible and inoperative. This interchange of courtesies, in aid of judicial proceedings, seems to be as common among the nations of Europe as it is with the several states of our Union: *Dalmer v. Barnard*, 7 T. R. 251; *Ex parte Worsley*, 2 H. Bl. 275; *Omealey v. Newell*, 8 East, 364; *Hornby v. Pemberton*, Mosely, 58; *Gason v. Wordsworth*, 2 Ves. 335, 336; *Garvey v. Hibbert*, 1 Jac. & Walk. 180; *Braham v. Bowes*, Id. 296. And in all such cases it would seem that the comity of nations is carried so far, that the public functionaries will not only suffer the commission to be executed by the commissioners to whom it is sent, but, if necessary, will compel a witness to appear and testify, so that his deposition may be taken, and returned to the tribunal of the foreign nation whence the commission emanated: *Young v. Cassa*, 3 Eccle. Rep. 417; *Mitchell v. Smith*, 1 Paige, 287; Mitf. Plea, 186, notes.

The tribunals of this state have often found it necessary to ask the assistance of the judicial power of the other states of our Union or of foreign countries, to procure testimony to obtain

the means of administering justice. And in doing so, those courts alone who ask or accept such assistance can have the authority to regulate its nature, form and extent. And they have accordingly laid it down as a general rule, that such acts, although varying in form in each case according to circumstances, must yet contain all the requisites essential to such acts when done here: Tidd Pr. 156. But the court, in such cases, is not called on to give any faith or credit, or to pass any opinion upon the effect of a judicial proceeding of another state. If it were, then that matter having been regulated by the constitution and laws of the United States, it certainly would be bound to submit to those regulations so far as they applied. But the question, how far this court will ask for or accept of affidavits taken in another state as the medium of that evidence, without which it will not act, is one of a totally different nature from that which involves the verity or effect of a judicial proceeding, which had been originated and completed entirely in another state, and with the formation of which it could have no concern. The constitution and act of congress of the United States, therefore, can have no bearing upon the subject now under consideration.

With regard to the affidavit to this answer, it is certainly not couched in phraseology as full and exact as it ought to have been; but it is conceived to be expressed in terms sufficiently clear and strong to sustain a prosecution for perjury, if it had been made in this state, and the answer had been found to be false in any material particular. And although, as it would seem, no such prosecution could be sustained here upon a false oath taken in another state, however correct and positive the affidavit might have been; yet the parties may, should the answer turn out to be false, or the affidavit be ascertained to be spurious, be punished for practicing an imposition on the court: *Omealy v. Newell*, 8 East, 372.

These preliminary objections being removed, it appears, on a careful consideration of the answer, that it is, in all respects, sufficient, and that it has completely sworn away all the equity of the complainant's bill.

I know of no such rule as that which was insisted on by the plaintiff's solicitor, that where the facts on which the complainant's equity rests are alike within the knowledge of both parties, and the allegation of them by each in an opposite bearing is equally positive, the injunction must be continued. The rule is, that on a motion to dissolve, the facts on which the plaintiff's equity rests must be admitted or not denied, or he can not

obtain a continuance of the injunction; but if they are positively denied by the answer, the injunction must be dissolved: Eden, Inj. 86. There may be exceptions to this rule, but this case is not one of them.

Whereupon it is ordered, that the injunction heretofore granted is hereby dissolved.

EXCEPTIONS TO ANSWER ON MOTION TO DISSOLVE INJUNCTION.—The rule here laid down that at the hearing of a motion to dissolve an injunction, the plaintiff may except to the sufficiency of the answer was re-affirmed in *Salmon v. Clagett*, 3 Bland. 132, where the chancellor said: "However it may be in the English courts in this particular, Eden on Injunctions, 73, 78, it has long been the practice of this court to hear and decide on the motion to dissolve, and the exceptions to the answer, at the same time: *Alexander v. Alexander*, Dec. 13, 1817; *Gibson v. Tilton*, 1 Bland, 353; and I shall, hereafter consider it as finally settled here that the motion to dissolve, and all exceptions to the answer which may then be filed, shall be taken up and decided upon at the same time; not, however, denying to the plaintiff the right, for the purpose of obtaining a sufficient answer, to the full extent required by the bill, to except to the answer within the proper time, after the motion for a dissolution of the injunction has been disposed of." But in 1835 a statute was enacted providing for the taking of the testimony with respect to the allegations of the bill to be returned on the day fixed for the hearing of the motion for dissolution, and it was subsequently held that the rule concerning the admissibility of exceptions to the answer at the hearing of the motion was modified by this act.

Thus, in *Belt v. Blackburn*, 28 Md. 227, it appeared that an appeal had been taken from an order granting an injunction; that the order was affirmed and the cause remanded; that the case was reinstated, a day fixed for the hearing, and leave granted to take proof; that evidence was taken, upon due notice, on both sides; that new parties were added, and further proceedings were had; and that at this stage of the cause, two and a half years after the answer was filed, exceptions thereto were for the first time taken, and it was held that they could not be considered. The opinion was delivered by Robinson, J., who said: "To permit exceptions to be filed to the answer at this stage of the cause, would be to grant not only an indulgence unreasonable in itself, and to encourage vexatious delays in the prosecution of suits, but it would be manifestly unjust to the defendants who have incurred the expense of taking proof, upon the well grounded belief that the case was to be heard upon its merits. The cases of *Gibson v. Tilton*, 1 Bland, 353; and *Salmon v. Clagett*, 3 Id. 126, relied on by counsel for appellants, are not in conflict with these views. These cases were decided previous to the passage of the acts of 1835, chapters 346 and 380, authorizing parties to take proof; and when on a motion to dissolve an injunction, the court was confined absolutely to the bill and answer. The motion, therefore, in the language of the chancellor, 'in its very nature was founded upon the correctness and sufficiency of the answer.' In such a case, the defendant could not object to the filing of exceptions to the answer at the hearing, because 'having planted himself upon the sufficiency of his answer, at that time and for that purpose, he stands pledged to sustain it in all respects, or he must fail in his motion.' In this case, therefore, the answer must be taken free from all objections, either on account of 'irregularity or insufficiency.'"

OWINGS' CASE.

[1 BLAND'S CH. 370.]

SUIT DISMISSED BY PLAINTIFF IN HER DOTAGE, through the undue influence of the defendant, will be reinstated and directed to be conducted by her solicitors in her name, subject to the control of the court.

COURT MAY PROTECT A PLAINTIFF IN DOTAGE from all personal restraint and undue influence without a writ *de lunatico inquirendo*, and may, if necessary, appoint a receiver to protect the property in litigation.

MERE WEAKNESS OF MIND, without imposition or fraud, forms no ground for vacating a contract; but if there be any unfairness in the transaction, the mental imbecility of the party may be taken into the account to show such fraud as will annul the contract.

CONTRACT OF ONE WHOLLY NON COMPOS MENTIS is utterly void.

MAXIM THAT A MAN SHALL NOT STULTIFY HIMSELF by his own plea for the purpose of avoiding his deed, is not a part of the law of Maryland.

IDIOCY is the condition of one who from his birth has never had the least glimmering of reason; it is not a derangement of the mind, but a total absence of all mind.

DELIRIUM is that state of the mind, produced by bodily disease, in which it acts without being directed by the power of volition, which is wholly or partially suspended, and is regarded by the law as a species of intellectual eclipse.

LUNACY is that condition or habit of the mind in which it is directed by the will, but is wholly or partially misguided or erroneously governed; or it is an impairment of one or more of the mental faculties, accompanied by or inducing a defect in the power of comparison.

DOTAGE is that feebleness of the mental faculties which proceeds from old age.

MENTAL IMBECILITY is a condition approaching that of one who is *non compos mentis*, and is analogous to childishness and dotage.

CIRCUMSTANCES COUPLED WITH MENTAL WEAKNESS, which will afford sufficient evidence of fraud to vacate a contract, considered.

DEED MADE BY ONE IN HER DOTAGE, conveying all her property, without consideration, to her daughter, should be set aside where it does not appear ever to have been in the grantor's hands, or to have been read by or to her, but was produced from the grantee's possession and executed at a time when the grantor was suffering from an attack of disease grievously affecting her mental faculties.

FRAUD AND DECEIT BY ONE WHO IS TRUSTED are most odious in law.

WHERE A TESTATOR IS INDUCED TO OMIT A BEQUEST or devise, which he had expressed an intention of inserting in his will in favor of a particular person by the promise of another to give to such person the same amount of property, or to provide for him in some other manner, such promise may be enforced in equity at the suit of the person for whose benefit it was made.

MERE EXPRESSIONS OF BENEVOLENT INTENTIONS, founded upon no consideration, are not enforceable in equity.

AFFIRMATIVE RELIEF TO A DEFENDANT, not responsive to the prayer of the plaintiff's bill, may be decreed where the equities of the whole case disclosed by the pleadings and proofs require it.

DECREEING CONVEYANCE WHERE PARTY IS INCOMPETENT.—Where a party required to make a conveyance is mentally incapable of contracting, the court in its decree may appoint a guardian to make the conveyance in such party's name.

SUIT ABATED BY THE DEATH of a party after a decree affecting both real and personal estate must be revived by or against both the heirs and personal representatives, in order to embrace the whole subject of the decree.

HEIRS OR PERSONAL REPRESENTATIVES MAY REVIVE and prosecute a suit thus abated after decree to the extent of their respective interests, but no further.

SUIT MAY BE REVIVED TO RECOVER COSTS taxed and allowed to a deceased plaintiff, as a liquidated and decreed debt passing to the personal representative.

BILL filed by Colegate D. Owings against her daughter Charlotte C. D. Owings to set aside a deed from the former conveying all her property to the latter on the ground that the said deed was without consideration and was procured by fraud, imposition and false pretenses practiced on the plaintiff, she being at the time deprived of the proper use of her faculties by reason of extreme age and ill health. The answer denied all the allegations of the bill, and alleged that the deed was made in pursuance of a promise made by the plaintiff to the defendant's father, a short time before his death, to provide for the defendant, whereby defendant's father had been induced to omit the defendant from his will. A general replication to the answer was filed. The facts are stated in the opinion of the chancellor on the final hearing.

A commission having been issued to take testimony, before it was returned, the plaintiff came to Annapolis with the defendant and filed a written order directing the register to dismiss the bill, which was done accordingly. The plaintiff's solicitors subsequently filed a petition supported by affidavits stating that the plaintiff, though not a lunatic, was incapable of transacting business, and that the order dismissing the bill was procured by the defendant by fraudulent practices and undue influence, and praying that the bill be reinstated and a guardian appointed to prosecute the suit for the plaintiff, and that such other order be made as the case might require. The chancellor made an order that testimony might be taken on the points involved in the application, that the plaintiff should be personally present at the hearing, and that in the mean time she should not be taken from her home so as to subject her to any inconvenience or to endanger her health, etc. Proofs having been taken, the application was brought to a hearing April 17, 1827.

BLAND, Chancellor. The matter of the petition to reinstate this case standing ready for hearing the solicitors of the parties were fully heard; all the proceedings and proofs were read, and the plaintiff, Colegate D. Owings, having been brought into the presence of the chancellor, he interrogated and conversed with her as to the subject in controversy and also on various matters having a tendency toward or connected with it. All of which the chancellor has deliberated upon and maturely considered.

The case is of a peculiar and extraordinary nature. It is not alleged, nor does it in any way appear, that at the institution of this suit anything was done that ought not to have been done; or that this proceeding was an improper one with a view to the rights and interests of the plaintiff: *Wartnaby v. Wartnaby*, Jac. Rep. 377. A cloud has been impending over the title to the property mentioned in the proceeding which threatens to gather and thicken by delay. The means of dispersing it, the proofs in relation to the controversy, may be more entirely, readily and cheaply obtained now than at any future period; therefore, justice as well as the peace and interests of all concerned seem strongly to require that the suit which has been begun should be reinstated, and now prosecuted with as little delay as may be to a final decision upon its merits, as prayed by the petition: 1 Coll. Idiots, 80; *Holman v. Holman*, 3 Desau. 210.

The order for dismissing it was given before the return of the commission for taking testimony, and as it would seem before all the testimony pertinent to the matter and within reach of the parties had been taken. For it appears that some of the proofs collected under the petition might be brought to bear upon the principal case. I therefore deem it improper at this stage of the proceedings more fully to explain the reasons which have brought me to the conclusion that the case should be reinstated, lest, in doing so, I might be supposed to intimate any opinion which should be reserved until the final hearing.

It is not my intention to say anything as to the commencement of the decline of the mental energy of the plaintiff; or to speak of the lucid intellectual efforts she may be now capable of making; but although it does not appear to be altogether settled according to the English authorities that a writ in the nature of a writ *de lunatico inquirendo* can be issued against any one who is merely in a state of dotage: *Leving v. Caverly*, Prec. Ch. 229; *Wall's case*, cited 3 Atk. 173; *Ridgeway v. Darwin*, 8 Ves. 66; *Ex parte Cranmer*, 12 Id. 446; *In re Holmes*, 4 Russ. 182; 2 Madd. Ch. 732, I deem it proper to observe that from the proofs of the present con-

dition of the plaintiff's mental faculties I shall regard her as completely under the especial protection of the court as she can be, short of her being formally placed under its guardianship by a regular course of judicial proceeding: *Donegal's case*, 2 Ves. 408; *Wartnaby v. Wartnaby*, Jac. Rep. 377; *Whitehorn v. Hines*, 1 Munf. 557; 1 Coll. Idiots, 65, 67. I shall expect that she shall be subjected to no manner of improper restraint or disagreeable influence not indispensably necessary for her welfare. If necessary, and it should be asked, the rents and profits of the property in controversy may be applied under the direction of the court to her support and benefit until a final decree can be had. And as an imbecile adult may be permitted to sue here by his next friend: 1 Mont. Dig. 39, I shall allow this suit to be henceforward conducted by the solicitors, by whom it was instituted, in the name of this plaintiff, subject, however, to the control of the court should there be any occasion for its interference: *Chambers v. Donaldson*, 9 East, 471; *Horner v. Marshall*, 5 Munf. 466. Whereupon it is ordered that the said suit heretofore instituted in this court by Colegate D. Owings against Charlotte C. D. Owings, which was dismissed on the thirty-first day of August last by order of the said plaintiff, be and the same is hereby reinstated in all respects as it stood before it was dismissed. And it is further ordered that the commission, with the testimony taken under it, which was returned and filed on the sixth day of November last, stand and be available in the said case, subject to all legal exceptions, in like manner as if the same had been returned and filed before the case had been dismissed.

It was subsequently agreed by the solicitors of the parties that the testimony taken on the hearing of the application to reinstate the cause should be used on the final hearing. The plaintiff's solicitors afterwards filed a representation that while the plaintiff was living in peace and comfort with one of her daughters, who took her to a camp-meeting, the defendant, in a rude and covert manner, took her in a carriage and conveyed her to Baltimore and placed her without her consent in a boarding house, where she was not comfortably cared for. The plaintiff's solicitors, therefore, suggested that the plaintiff's person should be confided to her daughter, Mrs. Nesbit, and that a receiver should be appointed for her property. The chancellor delivered the following opinion on this application:

BLAND, Chancellor. The chancellor has read and considered the statement filed and submitted this day by Messrs. Winchester and Gwinn, the solicitors of the plaintiff.

On passing the order for reinstating this case, it seemed doubtful whether the plaintiff was then in such a state of dotage as to warrant the issuing of a writ *de lunatico inquirendo*. Such a writ was not asked for by any one. The expression of an opinion to that extent, therefore, was not then considered necessary; and it was deemed best to leave the question as to the commencement and nature of her mental imbecility, as regards the matter in dispute, to be determined at the final hearing. Upon mature deliberation, it seemed at that time, however, to be within the scope of the powers of this court to protect the plaintiff, without the intervention of a writ *de lunatico inquirendo*, from all personal restraint or undue influence in any way or by any one; and also by the appointment of a receiver, or otherwise, to protect the property in litigation from waste, and to have its proceeds applied to her support until the matter in controversy could be heard and determined. With a view, therefore, as speedily as possible to release this aged plaintiff from all improper restraint, and of placing her in a condition of undisturbed comfort, and of having the property in dispute taken care of, it is ordered that any two or more of the medical professors of the university of Maryland who have not heretofore expressed any opinion upon the intellectual condition of the said plaintiff, Colegate D. Owings, be and they are hereby authorized and requested to visit and converse with her; and that she be permitted, without the least molestation or undue persuasion whatever from any one, forthwith, or at any time, to go and dwell in the house of any one willing to receive her, as may be thought proper or advisable by the said physicians, or a majority of them. And the said physicians shall as soon as practicable make report to this court of their proceedings, and of their opinion of the health and present intellectual condition of the said plaintiff: *Ridgeway v. Darwin*, 8 Ves. 67; *Ex parte Tomlinson*, 1 Ves. & Bea. 59; Shelf. Lun. 62, 399. And it is further ordered that the matter of the said representation of the said solicitors be finally heard and disposed of on the twenty-third day of October next. Provided a copy of this order, together with a copy of the said representation, be served on the said defendant, or her solicitor, on or before the twenty-fourth instant. Each party is allowed to take depositions before any justice of the peace, or the commissioners of this court in the city of Baltimore, to be read in evidence at the hearing of this matter on giving two days' notice as usual.

The case was afterwards brought to a final hearing, when the chancellor delivered his opinion as follows:

BLAND, Chancellor. This case standing ready for hearing, and having been submitted, without argument or notes, the proceedings were read and considered.

The bill charges that the deed of the fifteenth of June, 1824, was obtained by combination and fraud, which, of itself, if true, would afford a sufficient ground for the relief prayed. But this allegation is especially bottomed upon the statement that at the time the deed was executed, the plaintiff had been deprived of her intellectual faculties; and that she was then in truth entirely *non compos mentis*, either from great age, or by reason of the disorder under which she was then suffering. She makes her own incapacity the chief basis of her prayer for relief. But according to a maxim of the English law no man can be allowed to stultify himself for the purpose of avoiding his own deed: *Beverley's case*, 4 Co. 123. If we are bound by this maxim, and it be an established principle of our law, it is evident that everything in this case which can be considered as at variance with it must be rejected; and we must be confined to that alone which relates to the allegations of fraud, in total exclusion of everything respecting the plaintiff's personal disability occasioned by her alleged insanity.

The application of this maxim to this case, therefore, meets us here as a preliminary inquiry. Can the unfortunate or afflicted party himself make his own insanity a fountain of relief or defense? Is it a principle or maxim of the law of Maryland "that no man of full age shall be in any plea to be pleaded by him received by the law to stultify himself, and disable his own person?" *Beverley's case*, 4 Co. 123. I have not been able to find any adjudged case, or other respectable authority, showing in what manner this maxim has been received, or whether it has ever been adopted or rejected in this state. Therefore, whether it ought to be now received or rejected must depend upon the nature of the reasons and the policy by which it is sustained.

In England it is said that the process of this notion is somewhat curious, and although it has been handed down as settled law, yet that later opinions, feeling the inconvenience of the rule, have in many points endeavored to restrain it: 2 Bl. Com. 291; *Thompson v. Leash*, 3 Mod. 301; 1 Ld. Raym. 313; 2 Str. 1104. This maxim has received the entire approbation of few of the English lawyers, and by many of them it has been

not only questioned, but severely reprobated: 1 Coll. Idiots, 406; Coop. Med. Jur. 377. It is alleged to have been set up in defiance of natural justice and the universal practice of all the civilized nations in the world: 1 Fonb. 48. It has been shown from the most unquestionable authority that the ancient common law, without deviation, down to about the year 1330, recognized the right of the party himself to rely upon and prove his own insanity as a means of avoiding any contract made during his insanity: F. N. B. 466; 1 Pow. Cont. 19. And in a case which was decided about the year 1420, it appears that the plaintiff was permitted to allege as the ground of the relief he asked and obtained, that he was of great age, and that his discretion many times, and for the most part, had passed away from him, and that the bargain had been made when he was out of himself: 1 Lond. Jurist, 340. It is said by one of the most eminent of the English judges, sitting in an ecclesiastical court, that it is perfectly clear in law that a party may come forward to maintain his own past incapacity, and also that a defect of incapacity invalidates the contract of marriage as well as any other contract: *Turner v. Meyers*, 1 Hagg. Con. Rep. 414. After the most solemn and deliberate investigation, this maxim has been rejected in Connecticut; and in New York and Virginia it seems to have been put aside as unworthy of the least consideration or notice: *Webster v. Woodford*, 3 Day, 90; *Rice v. Peet*, 15 Johns. 503; *Horner v. Marshall*, 5 Munf. 466.

Mere weakness of mind alone, without imposition or fraud, forms no ground for vacating a contract. But if there be any unfairness in the transaction, then the intellectual imbecility of the party may be taken into the estimate, to show such fraud as will afford a ground for annulling it. Courts of justice, disclaiming all pretension to measure men's capacities, recognize no legal distinction but that which is drawn between persons of sound mind, and those who are *non compos mentis*. All persons in the former condition of mind, not otherwise disqualified, may make a valid contract; but all contracts made by those in the latter situation are deemed utterly void: 1 Fonb. 66. And yet, according to this maxim, no man can be allowed to stultify himself; that is, to show that he had not merely a weak mind, but that he was absolutely *non compos mentis*. If a man be of ever so feeble a capacity, short of lunacy, he may be allowed to prove that fact; or, in other words, partially to stultify himself in connection with other circumstances, in order to show that he had been defrauded. But if he be absolutely *non compos*

mentis, he shall not be permitted to prove that fact, or to stultify himself altogether; although it would seem to be difficult to understand how the obtaining from a lunatic a conveyance of his property, can be otherwise considered than as being in itself the strongest and most conclusive evidence of fraud. Hence, as it would seem, if the injured party should state that, being of a weak mind, he was imposed upon and defrauded, the defendant has only to prove an aggravation of his own iniquity, by showing that the plaintiff was, in truth, at the time, not merely weak, but actually *non compos mentis*, and he may be at once silenced by this maxim.

It is said that a man should not be permitted to stultify himself, "because, when he recovers his memory, he can not know what he did when he was *non compos mentis*." But this cause of the rule, as thus expressed, conveys a contradiction in terms, a solecism in itself. A man in madness is not himself; his mind is aliened and gone; the rational power has left its tabernacle, and is from home. It would be just as reasonable to say that he who is absent from his dwelling, should not obtain redress for any injury done to it during his absence, because when he returned home he could not know what had been done there while he was abroad; as that a person should not obtain redress by stultifying himself, because he could not know what he had done during the time he was insane. It has been well said, that he who jests upon a man who is drunk, injures the absent. But an innocent and unfortunate person is much more really and totally absent from himself in his madness than a man in his drunkenness.

It is the special duty of the state to take care of those who suffer under any natural infirmity which incapacitates them from taking care of themselves. And, therefore, to adopt a maxim which in its operation casts them out from the protection of the law, of which they stand so much in need, and leaves them to be stripped of their property by the most palpable fraud, appears to be exceedingly unjust and cruel. The reason of this maxim does, in effect, declare that the unfortunate are to be left unprotected, because they are unfortunate; that no care is to be taken of an innocent lunatic, because, being a lunatic, he knows not what he does, and can not take care of himself. While, on the other hand, it virtually proclaims that iniquity shall be protected, and that the defrauder shall be allowed to profit by his own wrong, and to enjoy his plunder in perfect security.

It is said, that "if the common law had given a writ of *non compos mentis* to him who has recovered his memory after alienation, certainly the law would have given him remedy for the maintenance of himself, his wife, children and family, although he recovered not his memory, but continued *non compos mentis*:" *Beverley's case*, 4 Co. 124. I do not clearly see the force of this inference; but it would seem, from what is said, that because a man can not have a deed set aside in order to recover his property, he is therefore utterly without remedy for the maintenance of himself and family during the continuance of his insanity.

This, however, is not altogether correct. A right of property necessarily implies that its owner has a remedy for the recovery of it; and also, that he is invested with the means of protection in the enjoyment of such property as the law allows him to dispose of without any other limit than that in doing so he shall not injure his fellow citizen. But if the owner has a wife and children, he is bound to maintain them, at least so far as his property affords him the means. This maxim applies only to the contracts of the lunatic; it does not prevent him from vindicating his right to his property by an action of ejectment, trespass, trover, etc.: 3 Bac. Abr. 541; nor does it release him from any obligation which his property will enable him to discharge. Now, it is in execution of this his own right, and in fulfillment of this his duty to his family, that the court of chancery has always acted in taking care of persons who are *non compos mentis* and their estates. For the court is bound, in behalf of the state, to keep the lunatic, his wife, children and household with the profits of his lands and estate, and to apply the whole to their use; although he recovers not his memory, but continues *non compos mentis*: *Beverley's case*, 4 Co. 127.

But we are told, that although the lunatic himself may be fettered by this maxim, yet there is a mode in which he may obtain redress; and that his heirs and personal representatives are not bound by this maxim. A commission of lunacy may be taken out, he may be declared a lunatic, and a committee appointed to take charge of his person and estate; and such committee may sue and have any deed, made by the lunatic during his insanity, vacated for his benefit. But why this circuit? The issue joined between the committee of the lunatic and his grantee must be exactly the same, and it must be met by precisely the same proof as if the lunatic himself had been

the party. But even this circuitous mode of redress is often lame, tardy and wholly inefficient. It is, however, better than none at all.

But if a lunatic, in the condition, having been defrauded of his property, should recover his reason, then there is an end even of this circuitous remedy. He is discharged from the government and protection of his committee, and left to regain his property as he can; taking care, however, that he does not allege his own former insanity as a ground for vacating any contract by which he may have been defrauded of it. Hence as regards his property, the recovery of his reason, instead of being a blessing, may be his greatest misfortune; for he may, notwithstanding he is in fact the owner of a large estate, be, by the operation of this maxim, fixed in penury during the remainder of his days. The granting of a commission of lunacy, it is said, is a matter not of right, but of sound discretion under all the circumstances: 1 Coll. Idiots, 67; *Rebecca Owings' case*, 1 Bland Ch. 290. But if this maxim prevails it should be held to be a matter of right, since it may be often indispensably necessary as the only means by which a lunatic can obtain justice.

The heirs and personal representatives of the lunatic are, however, not restrained by this maxim. They may obtain the redress which has been denied to him. The heir may recover the imperishable realty; but of whom is reimbursement to be obtained for the years of waste and devastation that may have been committed upon it during the life of the lunatic? The only remedy against the wrong-doer, in its best form, is a mere personal claim for an account of the rents and profits; but he may be a beggar. The administrator of the lunatic may reclaim his personal property itself, if to be found; or if not, he may sue for its value, if the wrong-doer can be found, and recover from him its full value, if he should be worth as much. He who delays to pay what is due, pays less than is due; but suspended and indefinitely deferred justice is a tantalizing, pernicious mockery. It appears to be most extraordinary, that any code of laws should recognize a case in which the existence of a wrong is admitted, and the redress for it is postponed until after the death of the injured individual: Shelf. Lun. 53.

There is, however, one highly respectable English lawyer who has attempted to vindicate this maxim. "Insanity," says he, "being a quality annexed to the mind of the party who is subject to it, is a conclusion upon his state of mind to be drawn

only from his own actions. A person, therefore, may assume this disability, whereas he can not feign infancy and duress, the proof not originating in himself and his actions, but subsisting independently. That being the case, the law (which is anxious to provide against the possibility of committing fraud, at the same time that it provides for the protection of rights) removes the temptation to practice the former, by prohibiting every man from setting aside his own deliberate acts by stultifying himself, although it furnishes a means by which his heirs, after his death, or his friends, whilst he is living, may avail himself of his disability. And it is to be observed, that the law in these cases does not proceed upon the ground that the party is bound; for that can not be, seeing that, by the law of nature, he wants the capacity to assent to a contract; but because the policy of the law, which rather submits to particular mischief than a public inconvenience, sets bounds to the law of nature in point of form and circumstance:" 1 Pow. Cont. 20.

The argument here derived from considerations of public policy results in this; that a greater amount of fraud and injustice would be likely to ensue by allowing men to stultify themselves in order to avoid their contracts, than by refusing them permission to do so for that purpose. And this position is founded on an assumption of the fact, that it is exceedingly easy to counterfeit madness without being detected; or that of those who do deceitfully pretend to be insane the far greater number escape detection; and consequently, but from this maxim the appearance of lunacy would be very frequently put on, for the purpose of practicing imposition and fraud. The position, however, is not sustained by the fact. It is incumbent for those who advance this argument to show that instances of feigned madness are common; and also that in those instances the detection of the deceit has been rare or difficult. In criminal cases, to defeat the progress of justice, and under various circumstances to escape from oppression or some imminent peril, the artifice of counterfeiting madness has often been resorted to; but no instance of fraud in civil cases, perpetrated by means of pretended lunacy, have been adduced, and I know of none.

The doubtful and uncertain point at which reason disappears and where incapacity becomes evident and manifest can only be fixed by the particular circumstances of each particular case. And it must be admitted to be difficult to lay down, with anything like positive precision, any rules by which the sanity of the mind can be tried. Insanity is, however, a fact; and like

every other fact upon which the rights of persons or of property may depend must be established by proof clear, strong, and demonstrative: *Attorney-general v. Parnther*, 3 Bro. C. C. 441. In cases of this sort, the evidence of medical men is, in general, produced, and, in proportion to the great improvements in that branch of science, such evidence is now more than ever to be relied upon. I, therefore, deem it a sufficient answer to this argument, derived from considerations of public policy, to deny the truth of the fact upon which it is based; and to rely upon the circumstance, that if there ever had been any such foundation for it, we should not, at this day, be at a loss to find any clear evidence of those facts in any foreign code, or in the innumerable English reported adjudications in relation to the subject of insanity.

It is admitted that many of the wise and sound maxims of the law are founded on considerations of public policy. But it by no means follows that they are each of them similar, and in principle alike, or that they do in any respect sustain each other by analogy. Upon considerations of public policy, the law will not permit the verity of certain public acts and judicial records to be called in question; but the foundation of that rule it is evident is very different; indeed, it is admitted to be directly contrary from that of this maxim in relation to contracts: 1 Pow. Cont. 22.

Upon the whole, I am clearly of opinion that this English rule which declares that a man shall not stultify himself by his own plea, never has been, and ought not to be considered as a part of the law of Maryland. And having thus disposed of this preliminary point, upon the determination of which the nature of the further investigation of this case so essentially depended, I feel myself now at liberty to take every view of it which the pleadings and proofs will warrant; and to dispose of it upon the established rules of equity, and the broad principles of natural justice; and shall proceed accordingly. Before I go into an examination of the proofs it seems to be proper that something should be said respecting the general nature of insanity, or that unsound condition of the human mind, to which so large a portion of the testimony relates, and upon a just conception of which infirmity a correct determination of this case so mainly depends. "Madness," says Sir William Scott, "is a state of mind not easily reducible to correct definition, since it is the disorder of that faculty with which we are little acquainted; for all the study of mankind has made but a very

moderate progress in investigating the texture of the mind even in a sound state. In disease where it has pleased the Almighty to envelop the subject-matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well known. We learn from experience and observation all that we can know, and we see that madness may subsist in various degrees, sometimes slight, as partaking rather of disposition or humor, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this; something which, if there be any test, is held by the common judgment of mankind to affect his general fitness to be trusted with the management of himself and his own concerns. The degree of proof must be still stronger, when a person brings a suit on allegation of his own incapacity, by exposing to view the changes of his mind:" *Turner v. Meyers*, 1 Hagg. Cons. Rep. 414. And an eminent physician, in "An Inquiry concerning the Indications of Insanity," observes that "the same intellectual light may be given to all; but in some obscured by a gross organization, and in others more happily organized, shining forth more brightly. Itself out of the reach of physical injury, it works by physical instruments; and the exactness of its operations depends on the growth, maturity, integrity, and vigor of its instruments, which are the brain and nervous system. If the nervous agents of sensation are unfaithful, the mind receives false intelligence, or transmits its orders by imbecile messengers; if the seat of thought, the center of intellectual and moral government, is faultily arranged, the operations of the understanding are impeded and incomplete. Nay, so dependent is the immaterial soul upon the material organs, both for what it receives and what it transmits, that a slight disorder in the circulation of the blood through different portions of nervous substance can disturb all sensation, all emotion, all relation with the external and the living world; can obstruct attention and comparison, can injure and confound the accumulations in the memory, or modify the suggestions of imagination:" Conolly Ind. Ins. 62.

The plaintiff has been subject to attacks from a disorder that has repeatedly darkened her understanding with delirium; and the proofs exhibit some of her conduct as indicative of lunacy; and that dotage, or intellectual weakness, which the bill represents to be her present condition, is a species of insanity which does not appear to have been very attentively considered, either by the profession of medicine or of law. Its approaches are

most commonly so gradual as to be for some time imperceptible, and the early evidences of it are almost always exceedingly equivocal. Under the generic term *non compos mentis* is comprehended every species of mental derangement which incapacitates a man from assenting to or making a legal contract. But for the purpose of obtaining as clear a view as may be of a subject so obscure, and without placing too much reliance upon any general definitions, I shall follow what appear to be the substantial distinctions marked by external indication, and recognized by our law as manifested in idiocy, delirium, lunacy, and dotage: 1 Par. & Fonb. 307; Rush on the Mind, 234; Shelf. Lun. intro. s. 2.

Idiocy is that condition in which the human creature has never had, from birth, any the least glimmering of reason, and is utterly destitute of all those intellectual faculties by which man, in general, is so eminently and peculiarly distinguished. It is not the condition of a deranged mind, but that of a total absence of all mind. Hence this state of fatuity can rarely or ever be mistaken by any, the most superficial observer. The medical profession seem to regard it as a natural defect, not as a disease in itself, or as the result of any disorder. In law it is also considered as a defect, and as a permanent and hopeless incapacity: 1 Par. & Fonb. 289, 308; Rush on the Mind, 292; Co. Lit. 246; 1 Hawk. P. C. 2, note; *Donegal's case*, 2 Ves. 408.

Delirium is that state of mind in which it acts without being directed by the power of volition, which is wholly or partially suspended. This happens most perfectly in dreams. But what is commonly called delirium, is always preceded or attended by a feverish and highly diseased state of the body. The patient in delirium is wholly unconscious of surrounding objects, or conceives them to be different from what they really are. His thoughts seem to drift about; wildering and tossing amidst distracted dreams. And his observations, when he makes any, as often happens, are wild and incoherent; or, from excess of pain, he sinks into a low muttering, or silent and deathlike stupor. 2 Zoonomia, c. 2, 1, 7; Rees' Cyclo. ver. Delirium; Rush on the Mind, 9, 298; 1 Par. & Fonb. 300. The law contemplates this species of mental derangement as an intellectual eclipse; as a darkness occasioned by a cloud of disease passing over the mind, and which must soon terminate in health or in death: 1 Coll. Idiots, 7, 405; 1 Fonb. 68; Shelf. Lun. 43; *Brogden v. Brown*, 2 Add. Eccle. Rep. 441.

Lunacy is that condition or habit in which the mind is directed by the will, but is wholly or partially misguided, or erroneously governed by it; or it is the impairment of any one or more of the faculties of the mind, accompanied with, or inducing a defect in the comparing faculty. For, as has been observed by a great philosopher, those who either perceive but dully, or retain the ideas that come into their minds but ill, who can not readily excite or compound them, will have little matter to think on. Those who can not distinguish, compare, and abstract, would hardly be able to understand and make use of language; or judge or reason to any tolerable degree; but only a little and imperfectly about things present and very familiar to their senses. The defect in idiots seems to proceed from want of quickness, activity, and motion in the intellectual faculties, whereby they are deprived of reason; whereas madmen seem to suffer by the other extreme; for they do not appear to have lost the faculty of reasoning, but having joined together some ideas very wrongly, they mistake them for truths, and they err as men do who argue right from wrong principles. For, by the violence of their imaginations, having taken their fancies for realities, they make right deductions from them. In short, madmen put wrong ideas together, and so make wrong propositions, but argue and reason right from them; but idiots make very few or no propositions, and reason scarce at all. The erroneous perception of some of the mental faculties, uncontrolled by his comparing faculty, often becomes exceedingly extravagant, and extends to the whole conduct of the individual. In such cases, lunacy is so strongly marked as to be obvious at first sight, or upon a single interview with the unhappy sufferer. The most strange, whimsical, and incongruous associations are made of thoughts and objects; matter and impertinency are mixed; and the mind is involved in the most obstinate and unaccountable mistakes. During these hallucinations, however, the perceptions seem to be in many respects quickened, and the maniac becomes exceedingly suspicious, watchful, cunning, and adroit: 1 Zoonomia, sec. 34, 2, 1; 2 Id. Cla. 3, 1, 2; Rus. Cyclo. ver. Mental Derangement; Locke Hum. Und. b. 2, c. 11, s. 12 and 13; Con. Ind. Insanity, 114, 300; 1 Coll. 8, 36; 1 Par. & Fonb. 302, 311, 318; Rush on the Mind, Idiots, 14, 72, 133, 257; Shelf. Lun. c. 3.

It very commonly happens, however, that the derangement of the mental faculties is confined to some particular idea or object of desire or aversion. The idea or object thus erroneously

contemplated is usually and not inaptly called the mad point; and hence this species of insanity has been denominated monomania. In cases of this kind, which may be adduced as a ground for relief or defense in any judicial controversy, it should appear that the morbid image in the mind of the patient has been connected by him with, and has perverted his judgment in relation to those of his acts which are drawn in question: *White v. Wilson*, 13 Ves. 88; *Bootle v. Blundell*, 19 Id. 508; *Dew v. Clark*, 1 Add. Eccl. Rep. 279, and 3 Id. 79; Shelf. Lun. intro. 54 and 293; Conolly Ind. Insanity, 383, 446. And as in monomania, there are whole classes of subjects as to which the intellectual faculties of the patient may be entirely trustworthy; so, on the other hand, even in cases of general insanity, there may be not only lucid intervals in all respects, but there may also be particular points and objects as to which the mind of the maniac may be perfectly clear, consistent, and sound; as in the case of the holographic will made by a lunatic woman, whose hands, at her earnest entreaty, were untied for the purpose of permitting her to write: *Cartwright v. Cartwright*, 1 Phill. 90.

But this protean disorder in its milder forms is not at all perceptible to a superficial observer, often escapes the notice of the most skillful, even after being apprised of the existence of the malady; and it frequently happens that it can not be detected without an examination of some time and repeated observations. Although in law this state of the mind is held to be a course or habit, not a mere act, but as having some continuance, yet it is considered as a distempered condition, occasioned by disorder or accident, from which the recovery of the patient is deemed possible and probable; and, therefore, he and his property are always disposed of with a view to a recovery: 1 Coll. Idiots, 33; *Beverley's case*, 4 Co. 124; *Donegal's case*, 2 Ves. 408; *Attorney-general v. Parnter*, 3 Bro. C. C. 441; *Fitzgerald, a lunatic*, 2 Sch. & Lef. 437; Shelf. Lun. 36.

Dotage is that feebleness of the mental faculties which proceeds from age. It is a diminution or decay of that intellectual power which was once possessed. It is the slow approach of death; of that irrevocable cessation, without hurt or disease, of all the functions which once belonged to the living animal. The external functions gradually cease, the senses waste away by degrees, and the mind is imperceptibly visited by decay. The inert and dull senses transmit the passing occurrences so imperfectly to the sensorium, that they leave none, or but a very transitory impression there. Hence, long past transactions are

often remembered with much more exactness than those which have taken place recently. In the second childhood, as in the first, all the present makes but a faint and fleeting impression upon the mind. Hence, the judgment in both stages is weak, and the conduct unsteady and frivolous.

But a man in his dotage is evidently distinguishable from an idiot, who has no mind at all; a patient in delirium, whose mind is ungoverned and ungovernable; or a lunatic, whose mind is in ruins, broken up, and the component parts of which are at variance with each other. The old man has a mind worn and in a state of decay, it is true, but still, so much of it as remains is feebly governed upon the principles of its former sound condition; its conceptions are not impertinently mixed; nor is it grossly misguided in any of the feeble operations of which it is capable. Perhaps the most striking peculiarity of dotage is its imbecility of perception. The senses not supplying the mind as usual with matter for exertion, it decays for want of use, and becomes incapable of receiving any additional ideas, or of following through any unusually catenated or long combination of thought. Hence, the infant and the dotard, from imbecility of bodily functions, present that remarkable similarity in the feebleness of their minds, and easily surrender themselves to the direction of those about them, for whom they have a regard, or who may choose to exercise any authority or influence over them. Physicians, it appears, do not regard this species of mental imbecility as being in itself a disorder or the effect of disease: Rees' Cyclo., ver. Death; 1 Par. & Fonb. 308; Rush on the Mind, 61, 292, 294; Conolly Ind. Insanity, c. 8, 440, 443. But the law considers it not only as a species of insanity, from which there is no hope of recovery, but as one which always becomes worse as age advances: *Leving v. Caverly*, Prec. Ch. 229; *Ridgeway v. Darwin*, 8 Ves. 66; *Ex parte Cranmer*, 12 Id. 446; *Gibson v. Jeyes*, 6 Id. 275.

It has been long and well established, that a contract made by a person who is, at the time, actually *non compos mentis*, either as in idiocy, delirium, lunacy or dotage, is entirely void; indeed, it would seem to be difficult to conceive how such a contract should ever have been otherwise considered than as an absolute nullity: *Thompson v. Leach*, 1 Ld. Raym. 313; 3 Mod. 301. But the law does not allow of an examination into the wisdom and prudence of men in disposing of their estates; for every man who is legally *compos mentis* is a disposer of his property, and his will stands for a reason. The law, how-

ever, so far regards human infirmity, as that if a person of weak mind be imposed upon, he may be relieved; not, however, merely because of his weakness of mind or of his old age; for that alone furnishes no sufficient ground for vacating a contract; yet, that with other circumstances will afford a sufficient foundation for relief: *Osmond v. Fitzroy*, 3 P. Wms. 130; *Willis v. Jernegan*, 2 Atk. 251; *Chesterfield v. Janssen*, 2 Ves. 156; *Lewis v. Pead*, 1 Ves. jun. 19; 1 Fonb. 66.

What is that degree of intellectual imbecility which may be taken into the estimate as one of the component parts of a ground for relief, in those cases where the boundary between mere weakness and a condition of *non compos mentis* is so narrow that it may be difficult to draw the line: *Bennet v. Vade*, 2 Atk. 325; I shall not undertake to determine, as I have not been able to find it any where particularly described: *Ball v. Mannin*, Shelf. Lun. 258. It must not, however, be confounded with mere ignorance. If the grantor be an ignorant and illiterate man, one who can not read, it is necessary that the deed should be fully and correctly read to him; for if it is not read at all, or improperly read to him, or if it be read or explained to him improperly even by a stranger: *Thoroughgood's case*, 2 Co. 9; he will not be bound by it; not on the ground of weakness of mind, or of his incapacity clearly to judge of what he was about; but because his sound mind can not be presumed to have assented to that of which it was wholly ignorant or misinformed: *Henry Pigot's case*, 11 Co. 27; *Hatch v. Hatch*, 9 Ves. 295.

It has been laid down in general terms, that it is fraudulent to obtain a deed by the exercise or undue influence over a man whose mind had ceased to be a safe guide of his actions: *Harding v. Handy*, 11 Wheat. 125; *Chesterfield v. Janssen*, 2 Ves. 156; or from a man who was of small understanding and not able to govern the lands which had descended to him: *Twyne's case*, 3 Co. 83. A woman who could read and write, and had taught a child to read, was held to be a person of weak understanding: *White v. Small*, 2 Ch. Cas. 103; so repeating scraps of Latin and reading classic authors was deemed no proof of sanity, because what a person learns in his youth leaves a lasting impression, and the traces of it are never entirely worn out. Such a person, though not a lunatic, was determined to be a weak man: *Bennet v. Vade*, 2 Atk. 325. In another case it is said, that the man was foolish to imbecility, though not to downright idiocy: *Bunch v. Hurst*, 3 Desau. 292. A man who had entirely recovered from a long continuance of lunacy is said to have been of a diseased

intellect from his birth: *Wright v. Proud*, 13 Ves 138. A young man is said to have been of mean parts and easy to be imposed upon: *Portington v. Eglington*, 2 Vern. 189. A person is spoken of as being seventy-two years of age and a weak man, easily to be imposed upon: *Clarkson v. Hanway*, 2 P. Wms. 204. And again it is said that the grantor was upwards of eighty-four years of age; blind or nearly so, and altogether dependent on the kindness and assistance of others: *Griffiths v. Robins*, 3 Madd. 191. From all which it would appear, that by weakness is meant a sort of mental imbecility approaching to the condition of one who is actually *non compos mentis* and analogous to childishness and dotage: *Kaimes' Pri. Eq.*, b. 1, p. 1, c. 1, s. 3 and c. 2; *Bates v. Graves*, 2 Ves. jun. 289.

The circumstances which, when taken in connection with this weakness of mind, constitute a foundation of fraud whereon to vacate a contract, are various: *Shelf. Lun.* 265. Such as that of the deed never having been left for perusal; or its not being read; or its being prepared by the grantee and obtruded on the grantor; or where the gift was exorbitant; or where the party had not then the means of paying what he stipulated to pay; or where in consequence of the relation in which the parties stood towards each other, or in any way, the grantee had obtained a commanding influence, or the entire confidence of the grantor, which was used; as in the case of a wife who had used unwarrantable means to insinuate herself into the favor of an old man, and by imposing on his weakness, had clandestinely obtained from him a conveyance of his estate: *Hervey v. Hervey*, 1 Atk. 564; *Mountain v. Bennet*, 1 Cox, 353; *Nantes v. Corrock*, 9 Ves. 183; or where the consideration was greatly inadequate; or where a weak man had conveyed all his property, leaving himself to be fed and clothed at the pleasure of the grantee. In all these and many other similar cases, the weakness of mind of the party who was not altogether *non compos mentis*, has been taken into account with the other circumstances, to make up that amount of imposition and fraud which was considered as a sufficient ground for relief: *White v. Small*, 2 Ch. Cas. 103; *Portington v. Eglington*, 2 Vern. 189; *Clarkson v. Hanway*, 2 P. Wms. 204; *Donegal's case*, 2 Ves. 408; *Bridgman v. Green*, Id. 627; *Bennet v. Vade*, 2 Atk. 324; *Norton v. Relly*, 2 Eden, 286; *Wright v. Proud*, 13 Ves. 136; *Huguenin v. Baseley*, 14 Id. 273; *Harvey v. Pecks*, 1 Munf. 518; *Rutherford v. Ruff*, 4 Desau. 380; *Rowland v. Sullivan*, Id. 518; *Brogden v. Walker*, 2 H. & J. 285; *Gibson v. Jeyes*, 6 Ves. 275.

This plaintiff, it appears, has, until the latter years of her long life, enjoyed a full share of sound, well regulated mental capacity; but when this suit was instituted she had advanced beyond the eighty-fourth year of her age, and upon a short interview which I had with her, after the commencement of this suit, it appeared that her age was attended with at least its ordinary infirmities. Some of the most skillful of the witnesses, after a short visit which they made to her, say that they observed in her mental powers a slower comprehension and a diminished power of associating her ideas, which is common to old age. Other witnesses represent her mind as then in a state of absolute dotage; in a condition of feebleness reduced much below that degree of power necessary to a sensible disposition of her property. And the defendant admits that the plaintiff was then so enfeebled by age and its consequent infirmities, that her mind was exposed to the exercise of very undue influence by those about her. From the very nature of this mental infirmity, it is evident that its then existence is, in itself, proof of its having commenced some time before. The transition from soundness of mind to delirium or lunacy may be very rapid or instantaneous; but dotage is a slow decay, the external signs of which do not appear until after it has been going on for some time. The proofs clearly establish the fact that the plaintiff is now in a state of dotage; but its perceivable commencement has not been so well ascertained. Two of the witnesses speak of its having been observable so much as about eight years ago. It is certain, however, that her dotage commenced some years before the institution of this suit. The proofs in relation to the plaintiff's conduct also exhibit some instances of the milder forms of lunacy. The plaintiff's account of a hurt she had lately sustained, ascribing it to her falling in a race she ran; the particulars she related of her visit to Annapolis, and some other circumstances, are evidences of that species of incongruous association and misguided direction of the mind, so peculiarly characteristic of lunacy. Such is the sum and substance of the testimony so far as regards the general condition of the plaintiff's mind.

In relation to the epoch of the execution of the deed of the fifteenth of June, 1824, the proceedings and the proofs are more distinct and particular. It is stated and admitted that the plaintiff was subject to attacks of erysipelas, and was suffering under that disorder when the instrument of writing, which is the special subject of this controversy, was executed. From

good medical authority, we learn that erysipelas is often preceded, or attended, or succeeded by delirium; that it is apt to affect the brain, and that the inflammation or oppression of the brain is known either by delirium with a quick pulse, or by stupor and slow respiration with a slow pulse; and that sometimes when the delirium is not complete, a new face and louder voice will stimulate the patient to attend for a few moments, and then he relapses; but glaring light, loud noises and company increase the irritation and aggravate the delirium: 2 *Zoonomia* Cl. 2, 1, 3, 2; Rees' *Cyclo. ver.* Delirium.

It appears from the testimony, that the plaintiff had been attacked with the erysipelas some days before the fifteenth of June, 1824; that one of the attending physicians was informed by the family, that the disorder of the plaintiff was a periodical one, and generally came on about eight o'clock in the morning. Dr. Marsh says, that during the paroxysms, there was always a determination towards apoplexy. Dr. Griffith visited the plaintiff on the fourteenth of June (he thinks in the afternoon); she then complained a good deal of her head, but was rational. The doctor perceived no disarray of intellect; and he thinks she was at that time sufficiently possessed of her faculties to make a contract, or dispose of her property. But after the doctor left her, and in the evening of the same day, she was delirious; or as the witnesses say, out of her head; and her mind was entirely gone; that when roused she would speak incoherently, and then sleep again, insensible to any thing that passed; that there was some company in the plaintiff's room, who were removed, lest their conversation and noise should disturb or injure her.

About sunrise of the morning of the fifteenth of June, the defendant came into the chamber of the plaintiff, and with a great noise hoisted the windows, threw open the shutters and let into the room a strong light; which, however, did not arouse the plaintiff, who had lain the whole night, and then was in a state of apparent preternatural sleep, insomuch so, that she did not notice an attendant, who, after the windows had been thus noisily opened, felt her forehead and took hold of her hand. Immediately after which the defendant was left alone in the room with the plaintiff thus abed. What passed, if anything, while these parties were so left together in the same room, does not appear. But in a short time afterwards, Thomas D. Cockey and John Fendal, two justices of the peace, who had the evening before been sent for and requested by the defendant to attend there on that morning, were introduced into the plaintiff's

iff's chamber by the defendant; they found the plaintiff quite awake, and interchanged with her the usual salutations on the meeting of acquaintances. Immediately after the coming in of these justices the defendant produced the instrument of writing referred to in the proceedings as the deed of the fifteenth of June, 1824; and offered it to the plaintiff for execution. The defendant raised the plaintiff up, and assisted in seating her in bed; and then on being accommodated by a desk placed in her lap to write upon, and having her hand steadied or guided by Justice Fendal, the plaintiff signed the instrument of writing and acknowledged it as her act and deed; and these justices took and certified the acknowledgment accordingly. This instrument of writing so signed by the plaintiff, which conveyed the whole of her property, was not then read to or by her, nor does it appear that she ever once saw it before; nor was there, at that time, any conversation upon the subject. No one else was then present in the room but these four persons, the two parties and the two justices. And, after the stay of about one hour in the house, the two justices departed.

These justices (one of whom, Fendal, only, it appears, but once ever saw the plaintiff at any other time during the illness under which she was then suffering) both assert that when they took her acknowledgment of the deed, she was in a sound state of mind. But other witnesses testify that on the morning of that day she was in rather a weaker condition than on the evening before; that her mind was evidently wandering; and that she was manifestly incapable of judging of the propriety or effect of any deed or other matter which required consideration, and that she had been in that condition some two or three days previous. About four o'clock in the afternoon of the fifteenth, Dr. Marsh visited the plaintiff, and found her apparently asleep, but on being once or twice called by the defendant, the plaintiff roused up, and gave him her hand. The doctor thinks she answered intelligently to all the questions he asked her. But he declined to answer directly, and say whether or not she was then in a sound state of mind; and says that the questions he asked her were not of a nature for him to judge of her sanity. On the next morning, the sixteenth, Dr. Marsh and Dr. Griffith, at nine o'clock, visited the plaintiff, and found her in an apoplectic state, entirely insensible, and unable to speak or move; and requiring all the strength of one of them to straighten her arm to bleed her. After being bled, she continued to be perfectly comatose, or absorbed in a preternatural sleep or stupor,

until daybreak of the seventeenth, when she awoke, but was still incoherent in her mind. After which she gradually recovered.

The instrument of writing, which was thus signed on the fifteenth of June, 1824, had been prepared by Justice Fendal, as he states, for and at the request of the defendant, about six months previous; but the defendant admits in her answer that she had caused it to be prepared by him in 1822. During the greater part of the interval between the periods of its preparation and execution, the plaintiff had enjoyed her usual state of good health. About six months before this instrument was executed, in a conversation upon the subject of the provision which the plaintiff had promised, or intended to make for the defendant, the plaintiff declared to the defendant that she should leave her no more than a life-estate in her property. And the plaintiff often before and after made similar declarations. The defendant had always continued to reside with the plaintiff, who had latterly confided the management of her estate very much or altogether to the defendant, who had always conducted herself to the plaintiff as a dutiful daughter; and the plaintiff had great confidence in the defendant.

Upon the whole, then, and after the most careful investigation of this case, thus far, there appears to be no one ground upon which this deed can be permitted to stand. It was prepared at the sole instance of the defendant. It was never at any time submitted to the consideration of the plaintiff, or in her possession for an instant before its execution; and at that time it was neither read by nor to her, or explained to her in any form whatever: *Thoroughgood's case*, 2 Co. 9. It conveys to the defendant, in the most full and comprehensive terms, the whole and entire estate, real and personal, of the plaintiff, without condition or reservation of any kind whatever. It professes to have been made for value received, but was in fact signed without the least valuable consideration; and if sustained, would leave the plaintiff utterly destitute and penniless. At the time of the execution of this deed, the plaintiff was upwards of eighty-four years of age; and was then, and had been for some time previous, in a state of general dotage, and, besides, was at the time suffering under an attack of erysipelas, that grievously affected her mental faculties, from which attack she could not have immediately recovered a perfectly sound state of mind, even after that bodily disease had intermitted or passed off, and which disorder must have considerably accelerated the previ-

ously commenced devastation of age: *Attorney-general v. Parnther*, 11 Bro. C. C.; 1 Lond. Jur. 340; *Sergeson v. Sealey*, 2 Atk. 413. This deed must, therefore, be annulled, as well because the plaintiff was at the time it was executed actually *non compos mentis*, as on the ground that it was obtained by the most gross abuse of confidence, and by a fraudulent combination; for, as it has been truly said, fraud and deceit by him who is trusted, are most odious in law: *Fermor's case*, 3 Co. 79.

Thus far the plaintiff will obtain all the equity she asks. But he who asks equity must do equity. The plaintiff herself seems to admit in her bill, when taken in connection with her late husband's will, which she exhibits as a part of it, that she stands here in some sort incumbered with an equity due to the defendant. And the only difference between these parties as to that claim is as to its extent. The defendant claims an absolute estate in fee-simple in the property of the plaintiff after her death. While, on the other hand, the plaintiff insists that the defendant's claim extends no further than a life-estate, with remainder to her lawful children, should she have any.

The bill states, that the plaintiff was seised in fee-simple of a land called "John and Thomas' Forest;" that at an early period of her life she married John C. Owings, who made his will, which is exhibited as a part of the bill, and died in February, 1810; that the plaintiff had intended, by her last will, to make some sufficient provision for the defendant, the nature of which is thus described. After some specific legacies to the plaintiff's children and grandchildren, to give the defendant an estate for life in her real property, the residue of her personal estate, and a remainder in the real estate to the defendant's children, should she have any; and in the event of failure of issue lawfully begotten, then to the other children of the plaintiff, to be equally divided among them. That the defendant being wholly dissatisfied with such a provision, and insisting on an unconditional, absolute estate in the whole, the plaintiff then openly avowed her determination to make no will; to die intestate, and to leave her property to pass and be distributed according to law. The defendant admits these facts; but alleges and insists, that four of her sisters having been amply provided for by the late Thomas C. Deye, their uncle, the plaintiff promised the late John C. Owings, the defendant's father, that she would give her estate to the defendant. In consequence of which, and in confident reliance upon that promise, her father made his will in the manner he did, leaving the defendant nothing more than

a mere token of his affectionate recollection. And the defendant avers, that the deed of the fifteenth of June, 1824, was made with a view to and in fulfillment of that promise.

From the proof it appears, that John C. Owings and the plaintiff, his wife, during their marriage, had eight children, who survived him; and that he had a large estate, consisting of real and personal property, within this state and elsewhere; that his uncle, the late Thomas C. Deye, was seised of a considerable real estate, which by his last will he devised to four of the daughters of his nephew, John C. Owings, each of whose shares contained from four hundred and fifty to six hundred acres of land, the least of which was estimated as worth about sixteen thousand dollars; that John C. Owings, the late husband of the plaintiff, by his will and otherwise, gave the whole of his real and personal estate to his two sons, Thomas D. Owings and John C. Owings, except some personalty, which he gave to his wife, and some other property, which he gave to his daughters in payment of a debt he owed them. The property he gave to his son Thomas is said to have sold for twenty thousand dollars.

In his will the late John C. Owings, the father of the defendant, says: "I give to my daughter, Charlotte Deye Owings, a family bible and a spinning-wheel as a token of my affection, it being my desire and expectation that her mother will provide for her, she having fully in her power to do so. Item: I give unto my four daughters, Mary C. Nesbit, Charcilla Cockey Deye Owings, Penelope D. Price, and Francis Thwaites Deye Owings, one family bible each, they having been heretofore provided for by my uncle, the late Thomas Cockey Deye."

Thus it appears to have been the intention of the testator, John C. Owings, so to dispose of his property as that the provision for each of his children, noticed in his will, should be entirely, or nearly equal. That is, of his eight children, he himself provided for two, his uncle had portioned four, and a seventh he left to be provided for by her mother. Of his eighth child, Cassandra, he takes no notice in his will; she had married, disposed of herself, and was then a resident at a great distance from him. It appears in proof, that the "desire and expectation" thus expressed by this testator, and the exclusion of his daughter Charlotte from any share of his property, was in consequence of, and founded upon an express promise made to him by the plaintiff (at a time when it is admitted on all hands she was in a perfectly sound state of mind), that she

would give all her property after her death to their daughter, this defendant, in fee-simple; and in full confidence that this promise so made to him for the benefit of Charlotte, would be faithfully observed and kept, he made his will, and in about one month afterwards died. Some time after the death of John C. Owings, his son John, being sick and in a rapidly declining state of health, declared his intention to devise his estate to his sister, this defendant, when his mother, the plaintiff, dissuaded him from doing so, and induced him to give it to his sister Cassandra, promising him that if he would do so, she, the plaintiff, would provide for the defendant. Upon the faith of which promise he made his will, devised his estate to his sister Cassandra, and died. There is nothing said in the pleadings about this devise by John to Cassandra; or as to John's inducement for making it. But it may be fairly inferred that the plaintiff was actuated by a strong feeling of equity towards all her children; and knowing that she had promised to give her estate to the defendant, she wished John's to take another direction, and be given to Cassandra, in order to provide for her; and also to prevent the defendant from obtaining a double portion. Taken in this point of view, I have deemed it a matter which might be noticed as a corroboration of the proofs in relation to the promise made by the plaintiff to her late husband for the benefit of the defendant.

There can be no doubt that the plaintiff always admitted she had intended to give a life-estate, at least, in her property to the defendant. Much testimony has been collected in relation to what the plaintiff had said since the death of her husband, as to the manner in which she intended to provide for the defendant. But the greater part of these declarations are proved to have been made subsequently to that period of time when her mental decay had commenced; and, therefore, so far as they may have been introduced as evidence of the affirmance of an equivocal or voidable promise, deserve little attention. But it is of no kind of importance to ascertain what were at any time the limits of the plaintiff's intended bounty to the defendant, because as to that her will is the law. Therefore, all the testimony which relates to her declarations of benevolent intentions, may be at once put out of the case.

The question here is, not what the plaintiff at any time kindly intended, but whether she had made such a promise as is alleged, and what have been her admissions and acknowledgments of that promise, if any. As to which, it appears that

when the plaintiff was called on, at a time about the commencement of her intellectual decay, to say whether she had actually made any such promise to her late husband in favor of the defendant or not; and whether anything was then said about her giving to the defendant anything less than an absolute estate of inheritance; she distinctly acknowledged that she had made such an unconditional promise; and that nothing was then said about an estate for life. And the plaintiff has since made similar acknowledgments as to the nature and extent of her promise. The circumstance that one of her children had been cut off from any participation in the father's property, because of her having promised to provide for such child was calculated, from its very interesting nature, to make a strong and lasting impression, and likely to be distinctly recollected even after her mind had fallen into a great degree of decay: *Bennet v. Vade*, 2 Atk. 325.

These acknowledgments of the promise are mainly corroborated by the circumstances of the late John C. Owings' family at the time of his death, and the disposition which he made of his estate by his will. His other children, there spoken of, having had estates of inheritance given to them by himself, or his uncle, shows what was his understanding of the plaintiff's promise at the time it was made to him; and that in the "desire and expectation" expressed in his will he alluded to a provision having the nature and extent of the others there made or spoken of, and not merely a fettered donation, or an estate for life only. Hence, all circumstances considered, I have come to the conclusion that the promise was made by the plaintiff, and to the extent alleged by the defendant.

To constitute a valid contract, the performance of which may be enforced either at law or in equity, it must be founded on a sufficient consideration. That is, the moving cause of the contract must be some benefit to the person called on to comply with it; or a benefit to a stranger; or some damage or loss sustained by the party claiming the performance; which benefit or loss has accrued or happened at the request or instance of the party of whom the claim is made: *Bunn v. Guy*, 4 East, 194; *Violett v. Patton*, 5 Cranch, 150. Upon a mere naked pact or agreement, not founded on any such consideration, no suit, according to our law, can be sustained either at law or in equity. In the case under consideration the defendant, it is shown, did sustain a loss by reason of the promise of the plaintiff.

This promise, however, was not made by the plaintiff to the

defendant; and yet it is, in general, essential to the nature of a consideration that it should move from the party asking performance of the contract; for if such party is a mere stranger to the consideration, having himself sustained no loss, nor conferred any benefit on the opposite party, he himself has no claim to have such contract fulfilled. But a father is under a natural obligation to provide for his children; and, therefore, a promise made to him for their benefit, as in this instance, may well extend to them. As where a father was about to cut one thousand pounds worth of timber to raise a portion for his daughter, the heir promised him that if he would forbear from felling the timber, he, the heir, would pay the daughter one thousand pounds. The father did abstain, in consequence thereof, from cutting the timber, and died. It was held that the contract with the father inured to the benefit of the daughter, was founded on a sufficient consideration, and that the daughter might sustain an action upon it against the heir and recover: *Dutton v. Poole*, 1 Vent. 318; *Martyn v. Hind*, Cowp. 443.

It is now regarded as the well settled doctrine of the court of chancery in England that if a person had, before his death, communicated his intention to make or alter his will, and give a legacy or portion of his property to a certain individual, and the heir or any one else had interposed and prevented the making or alteration of a will by a promise to pay the amount of the proposed legacy, to transfer the property or to give anything else in lieu of it to the individual thus intended to be benefited; that the promise so made is binding, as being made on a consideration of loss to the individual, who may, therefore, enforce the specific performance of it in a court of equity. The statute of frauds has been repeatedly urged as an objection against such promises, and the objection has always been overruled. The parent or friend of the individual intended to be benefited, being put at rest and relying upon such promise, dies in perfect confidence that it will be fulfilled. But if the individual who has been so disappointed of an express provision by the deceased could not have the promise enforced, his loss would be altogether irretrievable. The heir or person making would be suffered to frustrate the intention of the deceased, to practice a fraud with perfect impunity, and the statute of frauds, if it were allowed to apply, would be made to operate for the protection, instead of the prevention, of fraud: *Chamberlain v. Chamberlain*, 2 Freem. 34; *Oldham v. Litchford*, Id. 284; *Thynn v. Thynn*, 1 Vern. 296; *Drakeford v. Wilks*, 3 Atk. 539; *Reech v.*

Kennegal, 1 Ves, 124; *Dixon v. Olmius*, 1 Cox. 414; *Stickland v. Aldridge*, 9 Ves. 519; *Mestaer v. Gillespie*, 11 Id. 638; *Chamberlain v. Agar*, 2 Ves. & Bea. 259.

This doctrine, which has been so long and so well established in England, has been finally and solemnly recognized by the court of the last resort in this state. The case is to this effect: Charles Browne being seised of a considerable real estate in Maryland, declared his intention so to dispose of it; that if his eldest son and heir, James Browne, should inherit or succeed to the estate of Andrew Cochrane, in Scotland, then it should pass to and vest in his second son, Basil Browne. Upon which James promised his father that in the event of his obtaining Cochrane's estate he would convey the Maryland estate to Basil, provided his father would make no will and permit the Maryland estate to descend to him, James, as his heir at law. Charles, the father, in consequence thereof, died intestate, and suffered the Maryland estate to descend to James, who afterwards succeeded to the estate of Cochrane. Upon a bill filed by Basil the promise was held to be founded on a sufficient consideration, and it was decreed that James should convey the Maryland estate to Basil accordingly: *Browne v. Browne*, 1 H. & J. 430.

The defendant having, as appears in proof, lost, or failed to obtain an estate of inheritance, by reason of the plaintiff's having undertaken to give her such an estate in her property after her death, it is clear, according to the established principles of equity, that the defendant should, in some form or other, have the full benefit of that promise assured to her. The whole controversy is now, perhaps, as fully presented to this tribunal as it ever can be hereafter by any other or different form of procedure. It would, therefore, seem to be incumbent upon the court now, finally to dispose of the whole matter, as well on behalf of the defendant as on the part of the plaintiff. To stop short with decreeing that the deed of the fifteenth of June should be annulled, would be to dispose of no more than the one half of the matter in dispute. It would be leaving the claim of the defendant, which has been so fully developed by the pleading and proofs, to be determined at a future day, and most probably between other parties; the defendant, if she lives, on the one hand, and the representatives of the plaintiff on the other, who may be very numerous; and the proofs, which are now strong and satisfactory, may be then very much wasted or totally lost.

There are many cases in which this court, in order to dispose

of the whole matter in controversy, grants the relief to which the plaintiff has shown himself to be entitled upon terms. No one is allowed to take a fraudulent advantage of the weakness or necessities of another; as in cases of sales by expectant heirs; in cases between guardian and ward; in cases of usury and the like. But in all such instances, where the court grants the relief prayed, it is upon the terms that the plaintiff who asks equity shall do equity; and, therefore, the fraudulent securities are allowed to stand for what is really due, or they are vacated only upon condition that the plaintiff performs that which in equity and conscience he ought to perform: *Twistleton v. Griffith*, 1 P. Wms. 310; *Hylton v. Hylton*, 2 Ves. 548; *Nesbit v. Nesbit*, 2 Cox, 183; *Wharton v. May*, 5 Ves. 27. Upon these principles this fraudulent conveyance of the fifteenth of June might be vacated only upon the condition that the plaintiff should now, in conformity with her promise, make a settlement upon the defendant.

On a proper bill to account, after a decree to account, both parties are considered as actors, and therefore, according as the balance may be shown, there may be a decree in favor of the defendant, or in favor of the plaintiff: *Done's case*, 1 P. Wms. 263; *Anonymous*, 3 Atk. 691; *Horwood v. Schmedes*, 12 Ves. 316; *Bodkin v. Clancy*, 1 Ball & Bea. 217; *Davis v. Walsh*, 2 H. & J. 329; 1825, c. 158. But it is not essentially necessary in other cases that the decree should directly respond to the special prayer of the bill, by merely denying relief upon the case, or by granting it to the plaintiff, either conditionally or partially, or entirely as prayed. The matter in controversy being fully developed, a decree may, in several instances, be framed to meet the case disclosed, altogether apart from the relief which the plaintiff asks for himself: *Johnson v. Johnson*, 1 Munf. 554, note. As where a bill is filed against two or more defendants, and it appears that some of them are answerable only in the second degree, that is, as agents of a principal; in such case the principal will be first charged, and the agents only in the second degree, or upon the default of the principal: *The Charitable Corporation v. Sutton*, 9 Mod. 356; 2 Atk. 406; and so, too, where it appears that one is principal and the others are sureties, the court will, if called on when about to give the plaintiff the relief he seeks, go on to decree over as against the one who is principal, that in case the decree in favor of the plaintiff is satisfied by the sureties, they shall be reimbursed by their principal: *Walker v. Preswick*, 2 Ves. 622; *Taylor v. Ficklin*, 5 Mun. 25:

McNeil v. Baird, 6 Id. 316. And where there are two or more defendants a decree may be passed as between any two of them, when a case is made out between them by evidence arising from the pleadings and proofs between the plaintiff and defendants: *Chamley v. Dunsany*, 2 Sch. & Lef. 709, 718; *Conry v. Caulfield*, 2 Ball & Bea. 255. And also where, on a bill for a specific performance, the defendant proves an agreement different from that insisted on by the plaintiff, he may have a decree upon his answer submitting to perform the agreement, and this without a cross-bill, which was formerly deemed necessary: *Fife v. Clayton*, 13 Ves. 546; *Higginson v. Clowes*, 15 Id. 525. And it has been the practice of this court in similar cases, without a cross-bill, to decree as well in favor of the defendant as of the plaintiff, where it appeared from the nature of the agreement or transaction between them, that each was bound to pay money or to perform some act for the benefit of the other: *Dorsey v. Campbell*, 1 Bland Ch. 356. And even a direct decree in favor of the plaintiff may, in its consequences, operate as a decree binding his interests in like manner as if it had been passed directly against him. For it is now established, that if a bill filed by a mortgagor for redemption is dismissed, the money not being paid at the time specified in the decree for redemption, that operates as a foreclosure, and is equivalent to a decree for a foreclosure: *Stuart v. Worrall*, 1 Bro. C. C. 581; *The Bishop of Winchester v. Paine*, 11 Ves. 199. Or there may be a decree against both parties, as where the contest is as to some private right of property, and it appears from the proofs that the title is in neither, but in the state, both parties may be perpetually enjoined from using the property to the prejudice of the public: *Penn v. Ld. Baltimore*, 1 Ves. 454; *Barclay v. Russell*, 3 Id. 436; *Rex v. Leigh*, 4 Burr. 2146.

In such cases there can be no danger of surprise, or want of opportunity to adduce proof; because the indirect, inverted or constructive decree is confined to that subject alone, which the parties themselves have by their pleadings spread before the court. Here, the bill and answer disclose the whole matter in dispute, relative to the promise of the plaintiff, as fully as it could be done by a cross-bill. The defendant not only sets out and relies upon the promise of the plaintiff, but attempts to sustain the deed of the fifteenth of June, upon the ground of its being a mere fulfillment of that promise; thus representing the promise as the original contract. This allegation of the defendant has been put in issue as a material part of the subject in

controversy, and, like every other part of the matter in issue, it may, without the unnecessary circuitry and expense of a cross-bill, be met by such a decree as justice requires, either in favor of or against the plaintiff: *Harding v. Handy*, 11 Wheat. 120; *Stuart v. Mechanics and Farmers' Bank*, 19 Johns. 505.

Here again, however, we are met by another obstacle, arising from the present unsound intellectual condition of the plaintiff; and that, too, whether the decree in her favor be upon terms, or it be in part against her. But a change in the mental condition of a contracting party, by his becoming afterwards a lunatic, certainly ought not to release him from his liability. And it has accordingly been held that the rights of the parties remain unchanged by such an act of God. The only difficulty is, how to come at the remedy. If the legal estate is vested in trustees, a court of equity ought to decree a performance; but if it be vested in the lunatic himself, that, it was formerly held, might be an insuperable obstacle to any adequate relief here, because this court could, by its ordinary powers, only give relief by decreeing a conveyance, which the lunatic could not be ordered to make, because of his incapacity to contract: *Owen v. Davies*, 1 Ves. 82; *Pegge v. Skynner*, 1 Cox, 23; *Hall v. Warren*, 9 Ves. 611; Shelf. Lun. 429.

But here, although the legal estate is vested in the plaintiff herself, yet, if the matter were left at law, no relief could there be obtained against the plaintiff during her life; nor could a specific performance be obtained at any time against any one at law; therefore, from the very nature of the case, the relief necessary to meet it can only be obtained, if at all, in a court of equity. It is laid down that if a man, by age or disease, is reduced to a state of debility of mind, which, though short of lunacy, renders him unequal to the management of his affairs, the court will, in respect of his infirmities, appoint a guardian to answer for him, or to do other acts, as his interests or the rights of others may require: *Leving v. Caverly*, Prec. Ch. 229; *Sheldon v. Aland*, 3 P. Wms. 111, note; *Bird v. Lefevre*, 4 Bro. C. C. 100; *Wilson v. Grace*, 14 Ves. 172; *Attorney-general v. Waddington*, 1 Madd. 321; *Howlett v. Wildraham*, 5 Id. 423; *Wartnaby v. Wartnaby*, 1 Jac. Rep. 377; *Ex parte Clarke*, 2 Russ. 575; *Chambers v. Donaldson*, 9 East, 471; *Whitehorn v. Hines*, 1 Munf. 557; *Horner v. Marshal*, 5 Id. 466; 1 Fonb. 64; Mitf. Plea, 103; Prac. Reg. 71. And it is said that where one who could not be proved a lunatic was relieved from a deed obtained of him by fraud and imposition on his weakness, it was

further ordered that he should not execute any future deed but with the consent of the court: *Lord Donegal's case*, 2 Ves. 408.

It was upon these authorities that I passed the order of the seventeenth of April last. I deemed it then necessary to extend to the plaintiff the especial protection of the court, because of her age and infirmities. And if by reason of that infirmity merely, the court can in no way cause that to be done, which then in a sound state of mind she had bound herself to do, the most manifest injustice might ensue; and that, too, not from any substantial, but merely because of a technical or formal objection. If, as has been said, this court can declare that she shall not hereafter execute any deed without its consent; the converse of the proposition seems necessarily to follow that this court can, by its consent or decree, direct a conveyance to be made by her to the defendant, according to the promise by which she is bound.

There can be no doubt, that a specific execution of this promise would be decreed against the legal representative of the plaintiff if she were dead: *Goilmere v. Battison*, 1 Vern. 48. And it is equally clear, if she were now in her sound mind, she herself might comply with this promise, either by a last will devising her property to the defendant, or by a deed to take effect after her death: *Drakeford v. Wilks*, 3 Atk. 540. But she is not now, nor is ever likely again to be in a mental condition, understandingly of herself, to execute any such instrument as can pass any right in her property. It has, however, been expressly provided, that persons *non compos mentis*, seised or possessed of any lands bound by an agreement to convey, made by some person having a right to make such agreement, and therefore liable to a decree for conveyance on a suit for specific performance, shall convey and assure such lands in such manner as the court of chancery shall direct: 1773, c. 7, s. 1; 4 Geo. II., c. 10; Kilt. 249; *Bullock v. Bullock*, 1 Jac. & Wal. 583¹; and that in all cases where a decree shall be made for a conveyance, and the party shall neglect to comply therewith, such decree shall be considered to have the same operation as if the conveyance had been executed conformably to such decree: 1785, c. 72, s. 13; 1826, c. 159.

Upon the whole, I am, therefore, of opinion, that there is now no other course left but to appoint a guardian for the plaintiff, who shall be directed to execute, in her name, to the defend-

1. *Bullock v. Bullock*, 1 Jac. & Wal. 603.

ant, such a deed as shall be deemed a sufficient specific performance of her promise, to take effect after her death.

Whereupon it is decreed, that the said defendant, Charlotte C. D. Owings, be and she is hereby directed and required forthwith to bring into this court the original instrument of writing in the proceedings mentioned, purporting to be a deed made by the said plaintiff, Colgate D. Owings, unto the said defendant, Charlotte C. D. Owings, on the fifteenth day of June, 1824, to be canceled and annulled; and the same is hereby declared to be null and void; and the record which hath been made of the said instrument of writing among the land records of Baltimore county court, shall be and the same is hereby declared to be utterly void and of no effect whatever, because of the said instrument of writing having been obtained from the said plaintiff, Colegate D. Owings, by fraud and at a time when she was *non compos mentis*.

And it is further decreed, that William Gwynn, of the city of Baltimore, be and is hereby appointed guardian of the said plaintiff, Colegate D. Owings, for the purpose, and with full power and authority to make, execute, acknowledge and deliver, according to law, a deed of conveyance as hereinafter described, in the name and behalf of the said plaintiff, Colegate D. Owings, unto the said Charlotte C. D. Owings.

And it is further decreed, that the said plaintiff Colegate D. Owings forthwith execute, acknowledge, and deliver, according to law, by her said guardian William Gwynn, unto the said defendant Charlotte C. D. Owings a good and sufficient deed, thereby conveying all the real estate of the said plaintiff Colegate D. Owings in the proceedings mentioned, called "John and Thomas Forest," unto the said defendant Charlotte C. D. Owings, her heirs and assigns forever, and also by the same deed conveying, transferring, and making over unto the said defendant Charlotte C. D. Owings, her executors, administrators, and assigns, all the personal property of the said plaintiff Colegate D. Owings, which shall be and remain at the time of her death. And in the said deed of conveyance it shall be expressly stipulated and declared, that the same shall, in no respect, take effect, or have any force or operation whatever during the life-time of the said plaintiff Colegate D. Owings; but the same shall take effect and be in full force and operation upon and immediately after the death of said plaintiff Colegate D. Owings. And it shall be further expressly stipulated and declared in the said deed of conveyance, that if said defendant Charlotte C. D. Owings shall die

without leaving any lawful issue, in the life-time and before the death of the said plaintiff Colegate D. Owings, then and in that case the said deed of conveyance and every part thereof shall be utterly null and void to all intents and purposes whatever.

And it is further decreed, that the said defendant Charlotte C. D. Owings pay unto the said plaintiff Colegate D. Owings, her full costs expended in this suit, to be taxed by the register.

After this decision the plaintiff died, but an appeal was nevertheless taken to the court of appeals in her behalf. Subsequently one of the plaintiff's solicitors filed a petition, asking the court to make an order directing the defendant to pay the costs as taxed by the register, upon which the chancellor gave an opinion as follows:

BLAND, Chancellor. It may not be amiss here to observe, by the way, that in England an appeal from a decree in chancery may be had at any time within five years, with a saving in favor of persons *non compos mentis*: Shelf. Lun. 424. Here it is declared, that all appeals shall be made and entered within nine months from the time of making the decision, and not afterwards; unless it be alleged on oath, that such decree was obtained by fraud or through mistake: 1826, c. 200, sec. 14; but there is no saving in favor of persons *non compos mentis*.

Where a decree has been passed, as in this instance, affecting as well the real as the personal estate of the parties, and the suit abates by the death of either of them, as the realty passes to the heirs and the personalty to the administrator or executor of the deceased, in order to embrace the whole subject of the decree, it should be revived by or against both the heirs and personal representatives of the deceased party. But such a comprehensive revival of the suit is not in all cases indispensably necessary, as each class of the representatives of the deceased may revive and prosecute the suit to the extent of their respective interests, and no further: *Ferrers v. Cherry*, 1 Eq. Ca. Abr. 4. It is said that in England a suit can not be revived merely to recover costs not taxed; this, however, has been regarded there as a very odd rule: 2 Mont. Dig. 524; and having met with no instance of its having been acted upon by this court, I feel no hesitation in rejecting a rule which has been so often condemned, and which appears to be now reluctantly tolerated by the tribunal in which it originated. Be that, however, as it may, in this case the costs, it is alleged, have been taxed, and, therefore, the amount of them, as a liquidated decreed debt, on

the death of the plaintiff passed to her personal representative. Consequently, in order to recover that debt, this decree may well be revived by her executor or administrator alone; but no attempt appears to have been as yet made so to revive it.

Whereupon it is ordered, that the said petition be and the same is hereby dismissed with costs.

THE CASE HAVING BEEN TAKEN TO THE COURT OF APPEALS, the appeal was dismissed on the ground that after the death of the only complainant in a cause, an appeal from a decree of the chancellor could not be taken in such complainant's name, and that neither the appearance of the personal representatives of the deceased, on a suggestion of the death, in the appellate court, nor the defendant's appearance, would cure the defect: *Owings v. Owings*, 3 Gill & J. 1. The principal case was cited in *Frisby v. Parkhurst*, 29 Md. 69, as an authority upon the point as to when an agreement executed on one side will be enforced on the other. The doctrine here laid down as to what are to be regarded as *indicia* of fraud in a contract made with the person of weak intellect, was approved in *Highberger v. Stiffler*, 21 Md. 354, where a deed was vacated which appeared to have been procured without consideration, from an aged and illiterate woman by her son upon whom she was entirely dependent in all business affairs. In *Greenwade v. Greenwade*, 43 Md. 316, the court referred to *Owings' case* as authority for the principle, that the power of a court "to divest the citizen of his personal freedom and the control of his property is of an extraordinary and delicate nature, and never to be exercised without the precautions demanded by the law."

MENTAL UNSOUNDNESS AFFECTING LIABILITY ON CONTRACT.—This subject is discussed in the note to *Jackson v. King*, 15 Am. Dec. 361.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

SHAW v. POOR.

[6 PICKERING, 86.]

RECORDING A DEED EXECUTED BY TWO, but acknowledged by one only, is, at least, presumptive evidence of notice to creditors or subsequent purchasers. And it is immaterial whether the grantors were tenants in common, or were separately seised of distinct parts.

Writ of entry. Downing being seised of the premises in question, conveyed the same and other lands to Zebediah Shattuck, in 1793. Z. Shattuck, in 1808, conveyed a part of the lands to his son, Z. Shattuck, jun. In 1823, Shattuck and Shattuck, jun., conveyed all the lands described in the first deed to the plaintiffs, by a deed of mortgage regularly executed, but acknowledged by Shattuck, jun., only. This deed was recorded. The land demanded in this cause was that which belonged to Shattuck, sen., at the date of the mortgage. The tenant claimed under one Barnard, who had, subsequently to the recording of said mortgage, commenced proceedings against Shattuck, sen., and had taken the land under an execution under the judgment recovered. No other notice to Barnard, or the tenant of the mortgage, than that of the recording, was proved.

The cause was submitted on these facts for the opinion of the court.

Shaw and T. Fuller, for the demandants, cited: *Pidge v. Tyler*, 4 Mass. 547; *Taylor v. Jones*, 1 Salk. 389; Bull. N. P. 256, cites *Style*, 462; 1 Stark. Ev. 367.

Pickering and Clarke, for the tenant, cited: Anc. Charters, 85, 303; Stat. 1783, c. 37, sec. 4; *Marshall v. Fisk*, 6 Mass. 30

[4 Am. Dec. 76]; *Catlin v. Ware*, 9 Id. 220 [6 Am. Dec. 56]; *Dudley v. Sumner*, 5 Id. 480; *Underwood v. Courtown*, 2 Sch. & Lef. 68; *Morecock v. Dickens*, Amb. 678; *Simon v. Brown*, 3 Yeates, 186; *Heister's Lessee v. Fortner*, 2 Binn. 40 [4 Am. Dec. 417].

By Court, WILDE, J. According to the doctrine laid down by Parsons, C. J., in the case of *Pidge v. Tyler*, 4 Mass. 541, the registry of the deed from Shattuck and Shattuck, junior, to the demandants, under the circumstances of the case stated, must be considered as constructive notice of that conveyance to a subsequent purchaser. The deed being duly executed, passed the estate to the grantees as against the grantors and their heirs. It is valid also, having been duly proved according to the statute, against an intermediate purchaser, although at the time of the registry it was not acknowledged by Shattuck, senior, who was solely seised of that part of the granted premises now demanded.

The principal object of the registry act is to avoid the evils of secret grants, by providing the means of giving them publicity, and when a deed is regularly recorded all the publicity required is given, and the intention of the statute is fully satisfied. That the deed in question was regularly recorded, can not be denied, for certainly the grantees were entitled to have it recorded as the deed of the acknowledging grantor; and if so, it is impossible to say that the deed was not recorded by legal authority. If, then, the notice required by the statute has been given, the tenant's title must fail; for a purchase, whether by deed, or by levy of execution, with notice of a prior *bona fide* conveyance, is fraudulent and void in law. These principles are fully explained in the case referred to, and are supported by the English authorities on the construction of the statute of enrollments.

It is true that this doctrine of constructive notice is denied by Lord Redesdale in the case of *Bushell v. Bushell*, 1 Sch. & Lef. 90, but his decision rests on the construction of the Irish registry act, which materially differs from ours and those of England. How far Lord Redesdale's opinion may be supposed to have been influenced by this difference I will not undertake to say, nor is it necessary in this case to determine; for admitting his opinion to be correct in the full extent, as reported, still we think the demandant's title must prevail. He admits that the registry is notice to a certain extent. "No person," he says, "thinks of purchasing an estate without searching the

registry, and if he searches, he has notice;" but he denies that it is notice to all intents, or that it is conclusive evidence of notice. Now, if it is presumptive evidence only, that, in the present case, is sufficient; for it is submitted on this evidence, and it is agreed, that there is no other evidence touching the question of notice, so that nothing appears to repel the presumption of notice arising from the registry, and we may decide the case for the demandants without entering on debatable ground.

The case of *Heister v. Fortner*, 2 Binn. 40 [4 Am. Dec. 417], is distinguishable from the present case, for the question there arose on a deed which had not been regularly recorded; the publicity required by statute had not been given, and no one was bound to take notice of a deed defectively proved and not regularly registered.

As to the distinction made between the registry of a deed from two or more joint tenants, or tenants in common, and that of the deed in question, there seems no authority for it. The notice is the same, whether the grantors are seised as tenants in common of the whole land conveyed, or are separately seised of distinct parts. According to the agreement of the parties, the tenant is to be defaulted, and judgment entered for the demandants.

GARDNER v. MITCHELL.

[6 PICKERING, 114.]

NEWLY DISCOVERED EVIDENCE, CUMULATIVE in its nature, will not be ground for a new trial.

IDEM.—In an action for a breach of warranty of quality of certain oil sold, where verdict was found for the plaintiff, subsequently discovered evidence of declarations of the plaintiff, that the oil was of the proper quality, is not cumulative, and where the evidence was very evenly balanced at the former trial a new one will be granted.

MOTION for a new trial in an action for the breach of warranty of quantity and quality of certain oil sold by Mitchell to the plaintiffs, wherein a verdict had been rendered for the plaintiffs. The motion was made on the ground of newly discovered evidence. This evidence consisted of certain declarations made by Gardner that the oil was of the stipulated quality.

Sullivan and L. Williams, for the motion, cited: *Halsey v. Watson*, 1 Cai. 24; *Steinbach v. Col. Ins. Co.*, 2 Id. 133; *Doe v. Roe*, 1 Johns. Cas. 402.

K. Whitman, contra, cited: *Steinbach v. Col. Ins. Co.*, *supra*; *Pike v. Evans*, 15 Johns. 210; *Smith v. Brush*, 8 Id. 65; *Williams v. Baldwin*, 18 Id. 489.

By COURT. The bar are aware that the court look with jealousy upon applications like this, as it has become so common to apply for a new trial because the verdict was against evidence, or on account of evidence discovered since the trial, and it is so easy to procure new evidence to suit the case. And yet it is absolutely necessary that the court should have a control over verdicts, for sometimes they seem to be given unaccountably against the manifest justice of the case.

This action is brought upon a contract of sale of a quantity of oil, with a warranty that it should be of a merchantable quality, and should contain a certain proportion of head matter. It is alleged that the contract was not performed in regard either to the quantity or the quality of the oil delivered. The court have been obliged to look into the whole evidence in order to see the applicability of that which has been newly discovered. The plaintiffs introduced evidence which seemed very strong, and if it had been believed, the damages should have been twenty or thirty thousand dollars, instead of five thousand. On the other hand, it appeared that after the oil had been partly manufactured, so that the plaintiffs could have ascertained its quality, they entered into a reference solely in regard to the quantity delivered, nothing being said of the quality. Two persons, one appointed by the plaintiffs, and the other by the defendant, were employed to gauge the oil, and in gauging it is quite easy to ascertain the quality.

There was evidence, likewise, that if the oil had been as bad as it was represented by the plaintiffs, it would have been impossible to manufacture it into candles; nevertheless it was all sold before the trial, and the purchasers have made no application to the plaintiffs on account of its bad quality. We should have considered it at least a balanced case, notwithstanding the strong evidence on the part of the plaintiffs. Then comes the recently discovered evidence, upon which the application for a new trial is grounded. This is somewhat of a critical matter, as a party may so readily obtain new evidence to supply former deficiencies. Still the court ought not to shut their eyes to injustice on account of facility of abuse in cases of this sort. The evidence now brought forward is of confessions of the plaintiffs, and the question is, whether it is new, or only cumulative. If only cumulative, it does not furnish a sufficient cause

for a new trial. This is the ground taken in New York, and the reason is, that the party should have taken care to produce evidence enough to establish his point. But this evidence is of a different character. As to the body oil, which is made a subject of complaint, there is a confession of one of the plaintiffs that it was as good as he expected. This is a new fact which was not before in the case. The verdict was general, and apparently injustice has been done; and this being upon the trial a nicely balanced case, we think it should go again before the jury, with this new evidence.

New trial granted.

Parallel decision is *Myers v. Brownell*, 16 Am. Dec. 729.

VANDINE, PETITIONER.

[6 PICKERING, 187.]

BY-LAWS OF A CITY are binding on strangers coming within the territorial limits of the city.

CITY BY-LAWS PROHIBITING a person without a license from carrying offal and house dirt through any of the streets, are not in restraint of trade, but are valid.

PETITION for a writ of certiorari to the municipal court of the city of Boston. Vandine was prosecuted under a by-law of the city passed in April, 1826, by which it is ordained that no person shall remove, cart or carry through any of the streets, squares, lanes or alleys of the city, any house dirt, refuse, offal, filth or animal or vegetable substance from any of the dwelling-houses or other places occupied by the inhabitants in any cart, wagon, truck, hand-cart or other vehicle, unless such person, so removing, etc., together with the cart, etc., shall be duly licensed for that employment and purpose by the mayor and aldermen, upon such terms and conditions as they shall deem the health, comfort, convenience or interest of the city require, on pain of forfeiting a sum not less than three dollars nor more than twenty. It was proved that Vandine transported house dirt and offal from the yards of houses to his cart standing in the streets of the city. Vandine was an inhabitant of Cambridge, and there owned and kept a large number of hogs.

The presiding judge instructed the jury that the subject of regulation was one on which it was proper for the city to legislate, it having relation to the public convenience and the health

of the inhabitants, within Stat. 1821, c. 110, secs. 15, 17, and Stat. 1785, c. 75, sec. 7; that it was the duty of the city to remove from the streets and houses all nuisances which might generate disease or be prejudicial to the comfort of the inhabitants, and it was both reasonable and proper that it should be in their discretion to contract with persons to perform the work, so that it might be done on a general system. If it were found on experiment that the duty would not be thoroughly and faithfully performed, or would be attended with more expense to the city if individuals should remove these substances in their own carts and upon their own account, it was competent for the city government to enact a by-law which should subject all such persons to the vigilance of that government and which should require them to be first licensed. He further instructed the jury that, so far as, by virtue of the general laws of the commonwealth, the city council had power to make by-laws for governing the city, these regulations were binding on all persons actually resident within its limits, either for business or pleasure, and whether inhabitants or strangers; that the object of the by-law being to secure to the city the regular and effectual removal, by the public authority, of all sources of nuisance which are collected and accumulated in the houses in the city, by not suffering individuals under no obligation of trust to interfere in the same, it amounted to the prohibition of a nuisance, and that, so far as it affected trade, it was not a restraint but only a regulation of it.

To the directions and opinions the defendant filed exceptions.

Dunlap, on behalf of the petitioner. The by-laws of one town cannot be binding upon the inhabitants of another town, who come as strangers within the limits of the former. 1 Woodd. 498, cites 2 Vent. 33, 34; Com. Dig., By-Law, c. 2; Anc. Charters, etc., 195; Stat. 1785, c. 75, sec. 7; 5 Dane's Abr. 145. The by-law is void, being in restraint of trade; that the city may direct the time and manner of removing filth is not denied, but they have no right to say that it shall be removed only by persons having a license. 1 Rol. Ab. 364, Pl. 5; Anc. Charters, etc., 170; *Harrison v. Godman*, 1 Burr. 12; *Bosworth v. Hearne*, 2 Str. 1085; *Ipswich Taylor's case*, 11 Co. 53; *Case of Monopolies*, Id. 87.

Curtis, contra, upon the first position taken by the petitioner, referred to 2 Kyd on Corporations, 103; 1 Rol. Ab. 365, pl. 8; *Chamberlain of London's case*, 5 Co. 63; *Cuddon v. Eastwick*,

1 Salk. 192; *Butcher's Co. v. Morey*, 1 H. Bl. 370; *Pierce v. Bartrum*, Cowp. 269, and in regard to the authority of the city to pass the by-law in question: Stat. 1785, c. 75, sec. 7; 1816, c. 44, secs. 2, 3, 8; 1821, c. 110, sec. 17; Com. Dig., By-law, C.

By Court, PUTNAM, J. The first objection is, that this by-law is not binding upon strangers if it should be considered as binding upon the citizens of Boston. Some by-laws are binding upon strangers as well as upon the inhabitants or members of the corporation, and some are not. The distinction is between corporations united as a fraternity for the purposes of business, having no local jurisdiction, and corporations having a territorial jurisdiction; the former have not, but the latter have power to make by-laws binding upon strangers. For example, a by-law of the corporation of Trinity House, "that every mariner within twenty-four hours after anchorage in the Thames put his gunpowder on shore, does not bind, because the corporation has no jurisdiction upon the Thames:" Com. Dig., By-Law, c. 2.

In the case of *Dodwell v. The University of Oxford*, 2 Vent. 33, the chancellor's court of the university made a by-law that whoever, privileged or not privileged, should be taken walking in the streets at nine o'clock at night, having no reasonable excuse, by the proctor, etc., should forfeit, etc. And it was held that the corporation could not make a by-law binding upon any who were not of their body. They went beyond their jurisdiction, which could not be considered as extending to the inhabitants of Oxford who were not scholars. Regard is to be had to the nature of the incorporation; if it is a banking incorporation, for example, their by-laws must be confined to the proper mode of conducting their affairs. Where the corporation has a local jurisdiction, their by-laws affect all who come within it; for example, the by-law of the city of London, that no citizen, freeman or stranger, should expose any broad-cloth to sale within the city before it should be brought to Blackwell Hall to be examined whether it were salable or not, was held binding upon strangers as well as citizens: 5 Co. 63.

So in *Pierce v. Bartrum*, Cowp. 269, a by-law of the mayor and common council of the city of Exeter, that no person should slaughter beasts or keep swine within the walls of the city, was held good against the defendant, who was not free of the city, but only residing there. He was considered as an inhabitant *pro hac vice*. So where the corporation have jurisdic-

tion over all of the same trade or profession within certain limits, as the college of physicians have for seven miles round London, whose by-laws regulating the practice of physic are binding upon all within those limits.

The by-laws which are made by corporations having a local jurisdiction, are to be observed and obeyed by all who come within it, in the same manner as aliens and strangers within the commonwealth are bound to know and obey the laws of the land, notwithstanding they may not know the language in which they are written. They receive the benefits arising from the municipal arrangements, and are presumed to assent to them, upon the same principle which requires from them a temporary allegiance to the state for the protection it affords to them during their residence.

But it is contended that this by-law is void, as it is in restraint of trade, and operates as a monopoly. Every regulation of trade is in some sense a restraint upon it; it is some clog or impediment, but it does not therefore follow that it is to be vacated. If the regulation is unreasonable, it is void; if necessary for the good government of the society, it is good.

The case cited by the counsel for the defendant from 1 Rol. Abr. 364 was of the former character. The mayor and commonalty of London made a by-law, that no carman within the city should go with his cart without license from the wardens of such an hospital, under a certain penalty for each offense; and it was held to be a void by-law, because it was in restraint of the liberty of the trade of a carman, and it was held to be unreasonable, because it went to the private benefit of the wardens of the hospital, and was in the nature of a monopoly. Now, we think that case was rightly decided; it was an act of oppression. We perceive no reason why the wardens of the hospital should have a superintendence and control of all the business of the carmen, thus laying them under a contribution at the will of the wardens.

To arrive at a correct decision whether the by-law be reasonable or not, regard must be had to its object and necessity. Minute regulations are required in a great city, which would be absurd in the country. The cases upon this subject are well collected by Baron Comyns in his Digest, title Bye-Law. It has been found to be reasonable in the city of London to provide that brewers' drays should not be in the streets there after eleven o'clock in the morning in summer and one in winter; that no person should unload coals out of a barge if he be not

of the porters' company; thus in some manner restraining trade.

There have been regulations also adopted in that city that none shall be brokers unless licensed and sworn; that none shall be hawkers without license; thus in some measure restraining the natural rights of the subjects. Now, it is contended that the by-law under consideration is in restraint, and not a mere regulation, of the trade in which the defendant is engaged; that he provides as good and tight carts as the men do who are authorized by the city in the performance of this labor. We do not perceive that there is any more reason to complain of the law requiring a license to do this work than of the law prohibiting the keeping of livery stables in any place not licensed. One might just as well complain of the regulations which prevent him from being an auctioneer without a license; and so of various other trades and concerns which it is found necessary to subject to such restriction.

The great object of the city is to preserve the health of the inhabitants. To attain that they wisely disregard any expense which is deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times and in such manner as would best accommodate them. Every one will see that if this business were thus managed there would be continual moving nuisances at all times and in all the streets of the city, breaking up the streets by their weight and poisoning the air with their effluvia. It is obvious that the object and interest of the city and those of the carmen in this concern are extremely different. But it is contended that the city authorities may regulate strangers and unlicensed persons in regard to the number of horses and kind of carts to be employed, just as well as they can carts and the conduct of the licensed persons. It seems to us, however, that the city authority has judged well in this matter. They prefer to employ men over whom they have an entire control by night and by day, whose services may be always had, and who will be able from habit to do this work in the best possible way and time. Practically, we think the main object of the city government will be better accomplished by the arrangement they have adopted, than by relying upon the labor of others, against whom the government would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in

small loads, which will not injure the pavements nor annoy the inhabitants. We are all satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city.

The direction and opinion of the judge of the municipal court was entirely correct.

HALL v. WILLIAMS.

[6 PICKERING, 232.]

A PLEA OF NUL TIEL RECORD to an action on the judgment of a sister state should conclude not to the country, but with a verification.

SUCH A PLEA is the proper plea in such an action.

WHERE THE RECORD OF SUCH JUDGMENT states that the defendants therein had notice, or that they appeared in defense, it seems that it can not be gainsaid. But if the record does not show any service of process or any appearance in the suit, the effect of the judgment may be avoided by showing that the court had no jurisdiction of the defendant.

WHERE THE RECORD OF SUCH JUDGMENT shows that one of the two defendants sued in the action in the sister state was not served, and did not appear therein, the plaintiff in the action on such judgment can not amend his declaration by striking out the name of such defendant.

UNDER NIL DEBET PLEADED to an action of debt on a judgment of a sister state, the defendant, it seems, may show want of jurisdiction in the court to render the judgment.

A RECITAL IN THE RECORD that the defendant appeared by his attorney may be contested.

DEBT upon a judgment recovered against Williams and Fiske, the defendants herein, in the superior court of Georgia. The defendants pleaded: 1. *Nul tiel record*, concluding to the country, to which the plaintiffs demur, assigning for cause that the plea ought to conclude with a verification; 2. That neither of the defendants was served with process, or had notice of the original action, or appeared thereto, or authorized any person to appear for him; 3. That Fiske never was an inhabitant of Georgia, or resident therein, was never served with process, and never had notice of the original action, nor appeared thereto. To these two pleas the plaintiffs reply that the defendants are estopped by the record in Georgia from denying notice, appearance, etc. On oyer prayed and granted, the record is set forth, whereupon the defendants demur to the replication; 4. *Nil debet*; to which the plaintiffs demur.

From the record it appeared that the plaintiffs commenced a suit in Georgia, in May, 1824, against Williams and Fiske, as

late copartners under the firm of E. Williams & Co. The officer's return was: "I have served a copy on Edward Williams; Abijah Fiske not to be found in the county." The plea filed July 15, 1824, was: "And the said Edward Williams, by William W. Gordon, his attorney, comes, etc., and saith that he did not undertake," etc. In another part, the record states: "Afterwards, to wit, on, etc., came the within named Henry Hall, etc., as well as the within named Edward Williams and Abijah Fiske, within named, by their attorney within named, and the jurors, etc., upon their oaths say, etc. Therefore it is considered that the said Henry Hall, etc., do recover against the said Edward Williams and Abijah Fiske the damages aforesaid by the jury aforesaid, in form aforesaid, assessed," etc.

Loring, for the plaintiff. The plea of *nul tiel record* should have concluded with a verification: *Tidd's Pr.* 620; *Collins v. Mathew*, 5 East, 473; Const. U. S., art. 4, sec. 1; Laws U. S., 1 Cong. 2 Sess. c. 11; *Brown v. Clark*, 3 Johns. 444; 1 Stark. Ev. 153, notes; *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnel*, 3 Wheat. 234; *Commonwealth v. Green*, 17 Mass. 544. The judgment of a sister state is conclusive: *Mills v. Duryee*; *Hampton v. McConnel*; *Commonwealth v. Green*; *Green v. Sarmiento*, 1 Pet. C. C. 74; *Field v. Gibbs*, Id. 153; *Andrews v. Montgomery*, 19 Johns. 162 [10 Am. Dec. 213]. The plea of want of notice and non-appearance is altogether inadmissible, and the only remedy of the defendants, if the judgment is erroneous, is to procure a reversal by writ of error: *Field v. Gibbs*; *Benton v. Burgot*, 10 Serg. & R. 240; *Shumway v. Stillman*, 4 Cowen, 292 [15 Am. Dec. 374]; Co. Lit. 260, a; 2 Bac. Abr. 450, Error, A; *Reed v. Jackson*, 1 East, 355; *Jackson v. Robbins*, 16 Johns. 537; Fitzh. N. B. 21 I.; *Tidd*, 1108; *Den v. Zellers*, 2 Halst. 153; *Southgate v. Burnham*, 1 Greenl. 374; *McCormick v. Sullivan*, 10 Wheat. 192; *Richardson v. Walton*, 12 Johns. 434. Williams might have appeared for Fiske, and such appearance would have cured want of service of process, etc.: *Harrison v. Jackson*, 7 T. R. 207; *Dwerryhouse v. Graham*, 3 Price, 266, note; 1 Sellon's Pr. 100; *Martyn v. Skinner*, Barnes' Notes (3 ed.), 239; *Wilson v. Finch*, Id. 163; *Wade v. Wadman*, Id. 167; *Hand v. Grosvenor*, Id. 424; *Wetherall v. Hawes*, Id. 269. Upon the propriety of pleading *nil debet*, counsel referred to *Commonwealth v. Green*, *supra*, and moved the court, if they should be of opinion that the record was invalid, to amend plaintiff's writ by striking out the name of Fiske, so that the action might pro-

ceed against Williams alone: *Bridge v. Austin*, 4 Mass. 115; *Colcord v. Swan*, 7 Id. 291; *Woodward v. Newhall*, 1 Pick. 500.

W. H. Gardiner, contra. Judgments of sister states are not in all respects conclusive, but the question whether the court had jurisdiction over the cause and the parties, is in all cases left open: *Bartlett v. Knight*, 1 Mass. 402 [2 Am. Dec. 36]; *Bissell v. Briggs*, 9 Id. 462 [6 Am. Dec. 88]; *Flower v. Parker*, 3 Mass. 251; *Commonwealth v. Green*, 17 Mass. 543; *Warren v. Flagg*, 2 Pick. 448; *Borden v. Fitch*, 15 Johns. 141, 144 [8 Am. Dec. 225]; *Andrews v. Montgomery*, 19 Id. 164 [10 Am. Dec. 213]; *Shumway v. Stillman*, 4 Cowen, 292 [15 Am. Dec. 374]; 2 Kent's Com. 91; 3 Wheat. 235, note e; *Benton v. Burgot*, 10 Serg. & R. 242; *Aldrich v. Kinney*, 4 Conn. 380 [10 Am. Dec. 151]; *Thurber v. Blackbourne*, 1 N. H. 242; all of them subsequent to *Mills v. Duryee*, or *Hampton v. McConnel*, or both.

This doctrine is also maintained in *Kibbe v. Kibbe*, Kirby, 119; *Smith v. Rhoades*, 1 Day, 168; *Phelps v. Holker*, 1 Dall. 261; *James v. Allen*, Id. 188, 192; *Miller v. Hall*, Id. 229; *Hitchcock v. Aicken*, 1 Cai. 460; *Kilburn v. Woodworth*, 5 Johns. 37 [4 Am. Dec. 321]; *Hubbell v. Condrey*, Id. 132; *Robinson v. Ward*, 8 Johns. 67 [5 Am. Dec. 327]; *Taylor v. Bryden*, Id. 133; *Fenton v. Garlick*, Id. 194; *Curtis v. Gibbs*, 1 Pen. 399; *Rogers v. Coleman*, Hardin, 413 [3 Am. Dec. 733]; *Winchester v. Evans*, Cooke, 429; *Jacobs v. Hall*, 12 Mass. 25; 2. The plea of *nul tiel record* should conclude to the country: *Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88]; *Ripley v. Warren*, 2 Pick. 596; 3. The defendants are not estopped to deny, as in their second plea, what the record avers as to service and appearance: *Aldrich v. Kinney*, 4 Conn. 380 [10 Am. Dec. 151]; *Rider v. Alexander*, 1 Chip. 267; 4. Defendants are not estopped to deny want of notice to Fiske, as in their third plea; for, from the whole record, it distinctly appears that no notice was given to Fiske, and that he did not appear: 3 Inst. 173; *Erdman v. Stahlnecker*, 12 Serg. & R. 325; *Ward v. Johnson*, 13 Mass. 148; *Robertson v. Smith*, 18 Johns. 459 [9 Am. Dec. 227]; 5. Therefore the judgment can not be executed here, it being null and void: Cases above cited and *Tappan v. Bruen*, 5 Mass. 196; *Gibbs v. Bryant*, 1 Pick. 121; *Richard v. Walton*, 12 Johns. 434; 4 Laws of Ga. 12; *Kempe's Lessee v. Kennedy*, 5 Cranch, 173; 2 Bac. Abr. 501, Error, M.; *Hawes v. Hathaway*, 14 Mass. 233; 6. If these positions can not be maintained, then the plea of *nil debet* must be admissible: *Warren v. Flagg*, *Bissell v. Briggs*, and *Thurber v. Blackbourne*; 7. The plaintiffs can not be allowed to amend by striking out

Fiske's name, they should have had their judgment reversed, and commenced anew: *Richard v. Walton*, 12 Johns. 434; *Boaz v. Heister*, 6 Serg. & R. 18; *Curtis v. Patton*, Id. 135; 2 Bac. Abr. 500, 503; Error, M.; Com. Dig., Pleader, 3 B. 20; *Swearingen v. Pendleton*, 4 Serg. & R. 389; *Jones v. Rayne*, 4 Rand 386; *Cole v. Pennel*, 2 Id. 174; *Munford v. Overseers*, Id. 313; *Johnson v. Jebb*, 3 Burr. 1772; *Robertson v. Smith*, 18 Johns. 459 [9 Am. Dec. 227].

By Court, PARKER, C. J. In regard to the first plea, we are of opinion it is bad for the cause shown in the special demurrer. Whether there is a record or not, is generally to be tried by the court and not the jury, for it is to be tried by inspection only, and the court are the proper judges whether what is shown for a record is one.

If the judgment declared on is of a foreign court, it is not treated as a record, and a plea of *nul tiel record* is not a proper plea; but under an issue to the country, all exceptions may be taken to what is produced as a record, and the judgment proved is only *prima facie* evidence of debt.

Not so with domestic judgments, for the record of such being produced, they are conclusive evidence of debt, and there is nothing to submit to a jury, and whether there be such a record as is averred can be known only by an examination of the book in which it is contained, or an exemplification in due form of law by those who have the custody and keeping of the same.

Now, in this respect, the judgment of a court of any of the United States is by the constitution and law of congress of 1790, put upon the footing of domestic judgments; for being duly authenticated, as provided by the law, they are to have the same faith and credit given to them in every other state as they would have in the state where the judgment is rendered; so that, upon inspection of the authenticated copy, the court to which it is presented are bound to examine it and pronounce judgment upon it in the same manner that they would upon a record of any court of their own state: *Mills v. Duryee*, 7 Cranch, 481.

The different manner in which the pleadings to a judgment of an Irish court, when declared on in England, have been viewed by the court of king's bench, is owing to the difference of legislation on the subject; for though it is provided by statute that an action of debt shall be sustained on such a judgment, there is no legislative provision for the manner of authenticating the record, so that it is to be proved by witnesses like other

facts, and, therefore, must be referred to the jury: *Collins v. Mathew*, 5 East, 473.

Under the second and third pleas, to which an estoppel by the record is pleaded, the question arises, so often and long agitated, whether the judgment of a court in another state is to all intents and purposes to be considered conclusive as a judgment rendered in a court of the state would be, so that nothing can be averred against it, or whether such a judgment is to some purposes open for examination and inquiry, as to the grounds upon which it was rendered.

All agree that until the adoption of the national constitution, the principles of the common law, which are applicable in every country to judgments of the tribunals of foreign countries, were applicable to the judgments of the courts of the several states, when sought to be enforced by the judiciary power of any state other than that in which they were rendered; that is, they were considered only as *prima facie* evidence of debt, were to be declared upon not as records, but as showing a consideration for a promise or debt, and a plea of *nul tiel record* was not a proper plea, but non-assumpsit or *nil debet*, according to the form of the declaration.

This was definitely settled in England as the true character of foreign judgments as early as the year 1778, and had long before been the received law of that country: *Walker v. Willer*, 1 Doug. 1.

Such was the law before the revolution in this and all the colonies and provinces, and so continued until the adoption of the national government, as appears by numerous decisions in the several state courts, which will hereafter be cited to another point; except that by the statute of 14 Geo. III. c. 2, in Massachusetts, it was provided that an action of debt might be sustained on judgments of courts of the neighboring colonies (alluding probably to the old league between the then New England provinces), and that the records of those judgments, attested by the clerk of the courts rendering the same, should be good and sufficient evidence. And the statute of the commonwealth of 1795, c. 61, placed the judgments of courts of all the United States on the same footing on which they were intended to be placed by the constitution of the United States; an act of legislation which was quite unnecessary after the act of congress of 1790, before referred to. Under these provisions the judgments of sister states are no longer to be considered as mere foreign judgments, to be proved like other facts, by testimony to

the jury, but are to be treated altogether as domestic judgments in regard to the proof of their existence; and, therefore, the issue on a plea of *nul tiel record* is to be tried by the court only, so that such a plea concluding to the country is undoubtedly bad, as before stated.

But in regard to the conclusiveness of such judgments, to all intents and purposes, there is yet a question of considerable importance, which has been discussed and decided in almost every state in the union in which there are printed reports of their judicial decisions; and the question is presented now by the issue taken on the second and third pleas to this action. The defendants, in answer to the declaration, say, that neither of them was served with notice of the suit in which the judgment was rendered, nor appeared or authorized any one to appear for him in the action, and that Fiske was never an inhabitant of, or resident in, the state of Georgia. The plaintiffs reply that the defendants are estopped by the record to deny these facts, and the record being set forth on oyer, the defendants demur to the replication of estoppel. If it appeared by the record that the defendants had notice of the suit, or that they appeared in defense, we are inclined to think that it could not be gainsaid; for as we are bound to give full faith and credit to the record, the facts stated in it must be taken to be true judicially; and if they should be untrue by reason of mistake, or otherwise, the aggrieved party must resort to the authorities where the judgment was rendered for redress; for he could not be allowed to contradict the record by a plea and by an issue to the country thereon. But if the record does not show any service of process, or any appearance in the suit, we think he may be allowed to avoid the effect of the judgment here, by showing that he was not within the jurisdiction of the court which rendered it, for it is manifestly against first principles that a man should be condemned, either criminally or civilly, without an opportunity to be heard in his defense.

It can not be pretended, we think, that a citizen of Massachusetts, against whom a judgment may have been rendered in Illinois or Missouri, he never having been within a thousand miles of those states, should be compelled by our courts to execute that judgment, it not appearing by the record that he received any manner of notice that any suit was pending there against him, and being ready to show that he never had any dealings with the party who has obtained the judgment; and yet this must be the consequence, if the doctrine contended for

by some is carried to its full length, viz.: that the record of a judgment is to have exactly the same effect here as it would have in Illinois or Missouri; for in those states, if the process has been served according to their laws, which may be in a manner quite consistent with an utter ignorance of the suit by the party without the state, the judgment would be binding there until reversed by some proceedings recognized by their laws.

If it be said that a party thus aggrieved may obtain redress by writ of error, or a new trial, in the state where the judgment was rendered, it is a sufficient answer, that never having been within their jurisdiction or amenable to their laws, he shall not be compelled to go from home to a distant state to protect himself from a judgment which never, according to universal principles of justice, had any legal operation against him.

The laws of the state do not operate, except upon its own citizens, *extra territorium*; nor does a decree or judgment of its judicial tribunals, except so far as allowed by comity, or required by the constitution of the United States; and neither of these can be held to sanction so unjust a principle. If the states were merely foreign to each other, we have seen that a judgment in one could not be received in another as a record, but merely as evidence of debt, controvertible by the party sued upon it. By the constitution such a judgment is to have the same effect it would have in the state where it was rendered; that is, it is to conclude as to everything over which the court which rendered it had jurisdiction. If the property of a citizen of another state within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive. If the citizen himself is there, and served with process, he is bound to appear and make his defense, or submit to the consequences; but if never there, there is no jurisdiction over his person, and a judgment can not follow him beyond the territories of the state, and, if it does, he may treat it as a nullity, and the courts here will so treat it, when it is made to appear in a legal way that he was never a proper subject of the adjudication. These principles were settled in a most lucid and satisfactory course of reasoning by Chief Justice Parsons in the opinion of the court, delivered by him in the case of *Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88]. This exposition of the constitutional provision, respecting the records and judicial proceedings authenticated as the act of congress requires, takes a middle ground between the doctrine, as held by the court of this state in the case of *Bartlet v. Knight*, 1 Mass. 401 [2 Am. Dec. 36], and by the court of

New York in the case of *Hitchcock v. Aicken*, 1 Cai. 460, in both of which it was held that the constitution and act of congress had produced no other effect than to establish definitively the mode of authentication, leaving, in other respects, such judgments entirely upon the footing of foreign judgments, according to the principles of the common law. But in the case of *Bissell v. Briggs*, the principle settled is, that by virtue of the provision of the constitution and the act of legislation under it, a judgment of another state is rendered in all respects like domestic judgments, when the court where it was recovered had jurisdiction over the subject acted upon, and the person against whom it was rendered, leaving open for inquiry in the court where it was sought to be enforced, the question of jurisdiction, and taking the obvious distinction between the effect of the judgment upon property within the territory, and the person who was without it. It was thought that this was carrying the sanctity of judgments of other states as far as was consistent with the safety of the citizen who was not amenable to their laws, and as far as is required by the spirit or letter of the constitution of the United States.

The doctrine thus established here has been approved and adopted by the courts of the great states of Pennsylvania and New York, in both of which before it had been held that the judgments of the several states were to be treated as foreign judgments. The case of *Borden v. Fitch*, 15 Johns. 121 [8 Am. Dec. 225], is full to this point, and was, after the publication of the case of *Mills v. Duryee*, 7 Cranch, 481, determined in the supreme court of the United States, hereafter to be noticed. In this case the opinion of Chief Justice Parsons in the case of *Bissell v. Briggs*, is spoken of as putting the question upon a sound principle; and so, also, in the case of *Benton v. Burgot*, 10 Serg. & R. 242, in Pennsylvania, where the same doctrine is laid down in the opinion of the court delivered by Mr. Justice Duncan.

The principle upon which this exception is made to the conclusiveness in every particular of the judgments of other states, is well expressed by Mr. Justice Johnson of the supreme court of the United States, when dissenting from the decision of the court in the case of *Mills v. Duryee*. He says it is an eternal principle of justice "that jurisdiction can not be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction by being found within their limits."

Indeed, so palpable is this principle that no doubt could exist in the mind of any lawyer upon the subject, but for the construction supposed to be given to the constitution of the United States, and the act of congress following it, in the case of *Mills v. Duryee*, 7 Cranch, 481, and resanctioned in the case of *Hampton v. McConnell*, 3 Wheat. 234, in the brief opinion delivered by Chief Justice Marshall. This construction, when first referred to in this court, in the case of *Commonwealth v. Green*, was supposed to have put an end to all questions on this subject, and to have established as the law of the land that a judgment recovered in one state by a citizen thereof against a citizen of another was absolute and incontrovertible, and would admit of no inquiry even as to the jurisdiction of the court which rendered it. This court yielded a painful deference to the decision, without that close examination it would have received if presented to them otherwise than incidentally, and if its bearing had been of importance in the case then before the court; but the notice taken of the case was merely the expression of an opinion *arguendo*, and not a judicial determination of the question. And as a further reason for not receiving the doctrine implicitly as authority, it may be remarked that the case to which it was applied was one clearly within the jurisdiction of the court which decided it, so that the point now raised was not brought into question.

This is not the first occasion we have had to regret a too prompt submission to the decision of the supreme court of the United States, not, however, from any diminution of entire respect for that eminent tribunal, but because we have found that further consideration has brought about a qualification of the doctrine which seemed to have been definitively settled, or that some qualifying principle in the case itself has been overlooked by us in our readiness to yield supremacy to that court on all questions in which by the constitution their judgment is paramount. I allude to the decisions of that court on state insolvent laws, in the case of *Sturges v. Crowninshield*, 4 Wheat. 122, the effect of which we understood to be to overrule the decision of this court in the case of *Blanchard v. Russell*; in consequence of which we dismissed several cases which might have been maintained on the grounds of that decision. We have since learned by the case of *Ogden v. Saunders*, 12 Wheat. 213, that there is no decision of the supreme court of the United States militating with our decision, and feel ourselves justified in recurring to the principle there decided as the law of this commonwealth.

The case of *Mills v. Duryee* has, as its importance merited,

undergone a revision in almost every state court in the union of whose decisions we have any printed account, and the opinion has been unanimous, without the dissenting voice, so far as we can learn, of a single judge, that that case, however unqualified it may appear in the report, does not warrant the conclusion that judgments of state courts are in all respects the same when carried into another state to be enforced as they are in the state wherein they are rendered, but that in all instances the jurisdiction of the court rendering the judgment may be inquired into. In truth, all of them sanctioning the principles, and some of them by express reference, which were asserted by this court in the case of *Bissell v. Briggs* as the only just exposition of the provision in the constitution of the United States in relation to the records and judicial proceedings of states.

In the state of Maine it does not appear that their courts, since the separation, have been called to consider the question: *Adams v. Rowe*, 2 Fairfield, 95.

In New Hampshire there is a most express limitation of the effect of such judgments, similar to the case of *Bissell v. Briggs*, the opinion being delivered by Bell, J., now a senator of that state in congress, and concurred in by Woodbury, J., holding the same situation: *Thurber v. Blackbourne*, 1 N. H. 246.

In Connecticut the same doctrine was held and ably enforced by Chief Justice Hosmer in the opinion of the whole court as delivered by him: *Aldrich v. Kinney*, 4 Conn. 380 [10 Am. Dec. 151].

In New York and Pennsylvania the cases before cited maintain the same doctrine; also, *Shumway v. Stillman*, 4 Cowen, 292 [15 Am. Dec. 374].

In New Jersey it was decided that the judgment of a state court is conclusive, under the constitution and laws of the United States, between the parties, both parties being in court, and a defense made or opportunity had to make it, not otherwise: *Curtis v. Gibbs*, Pennington, 405.

In Kentucky, if the judgment of a state court be founded on the appearance of the defendant, or the actual service of process on his person, the judgment is conclusive, except when it might be impeached in the courts of the state where it is given. But where the defendant did not appear, and had constructive notice only, as by attachment or publication, it is not conclusive, but may be inquired into and impeached: *Rogers v. Coleman*, Hardin, 413 [3 Am. Dec. 733]. The opinion delivered by

Mr. Justice Trumble, now of the supreme court of the United States, is very full and able, and puts the conclusiveness of the judgment altogether upon the fact of the party's having had an opportunity to defend himself.

With such a cloud of witnesses in favor of the construction given to the clause of the constitution, which is in question by this court in the case of *Bissell v. Briggs*, we may well rest upon that as the true construction, if it is not the most clearly and explicitly overruled by the only tribunal whose authority ought to be submitted to, the supreme court of the United States. But notwithstanding all these decisions, many of which are subsequent in point of time to the case of *Mills v. Duryee*, and most of them commenting on it, we should be bound to give up the point if that case settles the question as conclusively as it has been supposed it did.

But all the state judges who have considered that case are of opinion that it was intended only to embrace judgments where the defendant had been a party to the suit by an actual appearance and defense, or at least by having been duly served with process when within the jurisdiction of the court which gave it, and they formed their opinion upon the following clause in the opinion of Mr. Justice Story, viz.: "In the present case the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the supreme court of New York was conclusive upon the parties in that state." If this is all that was intended to be decided, the case harmonizes with the general course of decisions in the state courts, as before cited, and it is in no respect different from the decision of this court in the case of *Bissell v. Briggs*.

In a slight examination of the case made by us when considering the case of *Commonwealth v. Green*, we supposed the decision to be more extensive, and felt bound to yield to it in a collateral question not essential to a determination of the cause then before the court; but having the general question now brought distinctly before us, we fully concur with the numerous learned judges who have given the restricted construction as above stated to the decision of the case of *Mills v. Duryee*.

We, therefore, are all of opinion that the record of a judgment of a court of another state is not conclusive evidence, but that to the extent stated in the case of *Bissell v. Briggs*, it is examinable, in order to ascertain whether the party against whom it is produced was subject to the judicial process on which it is grounded, and that where it appears by the record

itself that there was no appearance, and no notice which he was bound to attend to, the judgment against him is a dead letter beyond the territory within which it was pronounced.

Upon inspecting the record produced in support of this action, we find by the return of the officer who was charged with the duty of serving the process, that no notice of the suit was given to Fiske, one of the defendants, nor is it anywhere averred in the proceedings that he was an inhabitant of, or had ever been resident in the state of Georgia. The appearance by the attorney is for Williams alone, who had been duly served with process, and his plea to the action is filed for Williams alone. Afterwards, in the recital by the clerk before the record of the judgment, it is stated that the same attorney appeared for Fiske as well as Williams, but as this is a mere recital founded upon the prior proceedings, this case can not be taken to be an assertion of record that Fiske appeared by attorney, for it appears by the same record that the attorney appeared for Williams only, and there is no plea filed but for Williams. There is nothing, therefore, in the record which is contradicted by the second and third pleas, and the replication by estoppel is therefore bad, and the plea good, which settles the case in favor of the defendants, unless the judgment can be sustained against Williams alone, and this writ can be amended by striking out Fiske; but such an amendment would not help the case, for the judgment being entire, if it is a nullity with respect to one, it is also in the whole: *Richards v. Walton*, 12 Johns. 434.

Whether the facts stated in the second and third pleas might be shown in evidence on an issue to a plea of *nil debet*, it is immaterial to consider. But such was the plea in the case of *Bissell v. Briggs*, and there was no objection to the form, and Parsons, C. J., says: "Such judgments," meaning the judgments of courts in other states, "may be declared on as evidences of debts or promises, and on the general issue the jurisdiction of the courts rendering them is put in issue; but not the merits of the judgments." And in New Hampshire in the case before cited, it is expressly decided that the plea of *nil debet* is proper for the above purpose. In the other states, generally, the question has been raised by a special plea in the form of the second and third pleas in this action. We are inclined to the opinion that the plea of *nil debet* may be so used, and that on an issue formed on that plea, if it appear that the court rendering the judgment had jurisdiction, the record is

conclusive evidence of the debt; that is, if it appears affirmatively that the defendant was duly served with process within the state, or actually appeared and defended the suit, or appeared by attorney duly authorized, which latter fact, we think, may be contested, as was allowed in the case of *Aldrich v. Kinney*, 4 Conn. 380 [10 Am. Dec. 151], the record being only *prima facie* evidence of that fact, because no proof is ordinarily required of authority to act as attorneys.

If it appear by the record that there was no jurisdiction over the person, the judgment is a nullity, not to be received as *prima facie* evidence, and the plaintiff must resort to other counts to support his action, or fail.

The full faith and credit required to be given in each state to the judicial proceedings of other states will prevent any evidence to contradict the facts which show a jurisdiction, if such appear on the record.

JUDGMENTS OF SISTER STATE, EFFECT OF.—See *Bartlet v. Knight*, 2 Am. Dec. 36, and note; *Bissell v. Briggs*, 6 Id. 88; *Borden v. Fitch*, 8 Id. 225; *Shumway v. Stillman*, 15 Id. 374, and note; *Kilburn v. Woodworth*, 4 Id. 321; *Aldrich v. Kinney*, 10 Id. 151; *Rodgers v. Coleman*, 3 Id. 733, and note; *Hanover v. Turner*, 7 Id. 206, and note.

SMITH v. DENNIE.

[6 PICKERING, 262.]

ONE WHO PARTS WITH ALL HIS INTEREST in the subject-matter of a conditional sale is a competent witness for the plaintiff in an action of replevin by his co-vendor against attaching creditors of the vendee.

A VOLUNTARY DELIVERY OF GOODS sold on condition, without any reference to the condition, and followed by no demand for the performance of the condition, until after the goods were attached by the vendee's creditors, will be a waiver of the condition as regards such creditors.

REPLEVIN for ten boxes of sugar sold by Smith and Sears to Fairfield, and attached by the defendant at the suit of Fairfield's creditors. Sears sold all his interest in the sugar to the plaintiff after the attachment, and was offered as a witness by him in this action. It appearing that Sears was in no way accountable to the plaintiff if he failed to maintain his title, the testimony was heard. It appeared that the sale was made on the express condition that Fairfield should give an indorsed note for the price, but that the goods were delivered by the vendors' clerk in the absence of the vendors, and that nothing was said respecting the condition. Nor was any demand made

for the note until after the attachment of the goods by creditors of Fairfield, which was eight days after the sale. It was submitted to the jury, and by them found that the sale was conditional, and that there was no intention to waive the condition when the delivery was made. But the defendant contended that the permitting the sugar to remain so long in the possession of Fairfield, made it liable to the creditors of the latter. The judge, however, ruled against this position, and the defendant excepted.

Bassett, for the defendant, referred to 2 Kent's Com. 391; *Carleton v. Sumner*, 4 Pick. 516; *Payne v. Chadbolt*, 1 Campb. 427.

Fletcher, contra. To support the position that where the delivery was not intended to be absolute, the property in the chattels did not pass, cited: *Hussey v. Thornton*, 4 Mass. 405 [3 Am. Dec. 224]; *Marston v. Baldwin*, 17 Id. 611; *Barrell v. Pritchard*, 2 Pick. 515 [13 Am. Dec. 449]; *Carleton v. Sumner*, 4 Id. 516; *Palmer v. Hand*, 13 Johns. 434 [7 Am. Dec. 392]; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Harris v. Smith*, 3 Serg. & R. 20; *Chapman v. Lathrop*, 6 Cowen, 110 [16 Am. Dec. 433].

By Court, PARKER, C. J. It was left to the jury to say whether the sale of the sugar was conditional, and they have found that it was, upon a comparison of the testimony of Sears and Fairfield, between whose accounts of the transaction they had a right to choose on which to rely. We consider Sears to have purged himself of all interest by his sale to Smith, which sale is undoubtedly valid if the property of the sugar was not then in Fairfield for the benefit of his creditors.

The point of the case is, whether at the time of the sale, Fairfield then being in possession without fraud, on a purchase previously made of Sears, acting for himself and Smith, the property was not so far in him as to warrant the attachment by his creditors.

And this depends upon the question, whether the delivery after the sale was free from the condition on which the purchase was made. In the case of *Hussey v. Thornton* the delivery was conditional as well as the sale, and so the property was held to continue in the vendor. That the condition of a sale may be waived, so that the property will vest in the vendee notwithstanding he has not performed the condition, seems to be well settled in that case of *Hussey v. Thornton* [3 Am. Dec. 224], and in a more recent case of *Carlton v. Sumner*, 4 Pick. 516 (2

ed. 517, note 1); and the doctrine thus settled here is adopted by Chancellor Kent in his Commentaries, vol. 2, 391 (3 ed. 497).

The principle is, that if the vendor who has sold upon condition permits the vendee to take the goods without exacting of him a compliance with the terms of the sale, he shall be presumed to have abandoned the security he intended, and to trust to the personal security of the vendee, and whether such is the state of things or not is matter for the jury to settle upon the facts proved. We do not think, after a conditional bargain has been made and a delivery immediately taken place, upon the expectation that the contemplated security shall be produced, without an express declaration that the delivery is also conditional, that the sale *ipso facto* becomes absolute, because there is an implied understanding that the vendee will act honestly, and he takes the goods subject to the contract, which is, that he shall furnish the security which was the condition of the sale as soon as he shall have opportunity to procure it; and it would much embarrass sales at auction and other sales to require that the vendor should in all cases insist upon the note or other security being produced before the goods shall be delivered; and in case no new credit is obtained by the vendee in virtue of his possession of the goods, no wrong is done by allowing the vendor to reclaim them.

If they are sold by the vendee, he having the possession delivered to him by the vendor, the purchaser not knowing of the condition, the case would be different, as the vendor would be considered as having delivered them for the very purpose of enabling the vendee to use them in trade and merchandise, trusting to the performance of the condition by the vendee. But there seems to be no good reason why an antecedent creditor, watching the transactions of his debtor, should have a right to seize upon goods which came into his possession when he has not paid for them, or given that security without the promise of which he could not have obtained the goods. Such creditor has not trusted on the faith of the goods, and is, therefore, not prejudiced by being restrained from attaching them.

It was, therefore, for the jury to decide this case, and upon the question put to them by the court, viz., whether there was an intention on the part of Sears, the vendor, to deliver absolutely, and so to waive the condition on which the sale was made. We understand the case of *Carleton v. Sumner* was so

put to the jury in effect; for if there was a right by the contract to insist upon the promised security before the goods were delivered, this right could not be lost but by an intentional waiver, so that the question now is, whether the verdict is against the evidence on that point. Here the condition of security by an indorsed note must be considered to have been absolute and explicit. The goods are delivered by the clerk without anything being said about the security; a bill of parcels is given, but without any receipt; no note is taken, and no money paid. The vendor certainly had a right the day after to insist upon his indorsed note, or to rescind the bargain and reclaim the goods. If so, why not two days or three, and if so, the time which elapses is a mere fact, from which the jury may infer the intention. Circumstances of business and engagement may account for the delay, and if they do, the right to security or to reclaim the goods, unless sold as before mentioned, is not impaired; and perhaps the law would be the same if the sale had been for cash and not on credit, for even in such case, the mere delivery, with an expectation of receiving the price in a short time, does not divest the property of the vendor: 2 Kent's Com. 391 (3 ed. 497, 498).

But in the case before us, eight days passed between the delivery of the goods and any call for the indorsed note, nor was any intimation made of the security to be given, when the goods were delivered by the clerk, who does not appear to have been informed by the vendor of the terms of the sale. The latter, however, must be presumed to have known the next day that they had been delivered, and yet he did not send for the note, or give any manner of notice that it was required, until the attachment took place eight days after the sale. We are apprehensive, that to establish the right to reclaim under such circumstances, would widen the door for fraudulent contrivances, and that afterthoughts respecting conditions will spring up to intercept attaching creditors, when the sale was really unconditional, or at least when the vendor has thought his condition of so little importance as to be willing to abandon it and trust to the credit of the purchaser.

We are of opinion that the verdict is against the evidence, for there is nothing in the case from which an intention to hold on upon the condition can be inferred; no declaration at the time, which, though not necessary, is important, and no call for security until it was forgotten or abandoned, and, perhaps,

never would have been recurred to if the goods had not been attached.

The case is like that of *Hussey v. Thornton* [3 Am. Dec. 224], before cited, in which it was determined that a voluntary delivery of goods sold upon condition, without the delivery being *sub conditione*, exposes the property to attachment by the creditors of the vendee. And it was upon the same principle that the case of *Carleton v. Sumner*, also before cited, was decided. We think for the foregoing reasons a new trial must be granted.

VALIDITY OF CONDITIONAL SALES AS AGAINST VENDEE'S creditors and purchasers: See *Barrett v. Pritchard*, 13 Am. Dec. 449, and note; see, also, *Whitwell v. Vincent*, 16 Id. 355.

BLAKE v. WILLIAMS.

[6 PICKERING, 286.]

A FOREIGN ASSIGNMENT IN BANKRUPTCY does not operate as a legal transfer of the bankrupt's property in this state, as against a creditor here of the bankrupt. And the attachment under a trustee process of goods here belonging to the bankrupt, before notice of the assignment, is valid against the assignment.

TRUSTEE process. The opinion states the case. The question arose, in regard to the effect of an assignment in bankruptcy by a debtor resident in England, upon an attachment of a debt due the bankrupt from a resident of this country; the attachment having issued before knowledge of the commission, and the attaching creditor residing here.

W. H. Gardiner, for the plaintiff, contended, that, with the exception of *Holmes v. Remsen*, 4 Johns. Ch. 46 [8 Am. Dec. 581]; S. C., 20 Johns. 229 [11 Am. Dec. 269], it has been uniformly held in this country, that attachments similar to the one in question are valid, even where commissions of bankruptcy had issued in Great Britain, and an assignment had been made under it, prior to the attaching of the debt in this country: *Bird v. Pierpont*, 1 Johns. 118; *Van Raugh v. Van Arsdaln*, 3 Cai. 154 [2 Am. Dec. 259]; *Proctor v. Moore*, 1 Mass. 198; *Raker v. Wheaton*, 5 Id. 509 [4 Am. Dec. 71]; *Watson v. Bourne*, 10 Id. 337 [6 Am. Dec. 129]; *Ingraham v. Geyer*, 13 Id. 146 [7 Am. Dec. 132]; *Walker v. Hill*, 17 Id. 383; *Burk v. McClain*, 1 Har. & McH. 236; *Mawdesley v. Parke*, a Rhode Island case, cited in *Sill v. Worswick*, 1 H. Bl. 680; *Jones v. Blanchard*, cited in *Top-*

ham v. Chapman, 1 S. Car. R. 285; *Ex parte Blakes*, 1 Cox, 398; *Taylor v. Geary*, Kirby, 313; *Wallace v. Patterson*, 2 Har. & McH. 463; *Ex parte Franks*, 1 Cooke's Bankr. L. 336; *Phillips v. Hunter*, 2 H. Bl. 402; *Ward v. Morris*, 4 Har. & McH. 330; *Smith v. Smith*, 2 Johns. 235 [3 Am. Dec. 410]; *Bird v. Caritat*, Id. 342 [3 Am. Dec. 433]; *Goodwin v. Jones*, 3 Mass. 514 [3 Am. Dec. 173]; *Harrison v. Sterry*, Bee, 244; S. C., 5 Cranch, 289; *Dawes v. Boylston*, 9 Mass. 337 [6 Am. Dec. 72]; *Milne v. Moreton*, 6 Binn. 353 [6 Am. Dec. 466]; *Blanchard v. Russell*, 13 Mass. 1 [7 Am. Dec. 106]; *Dawes v. Head*, 3 Pick. 128; *Odgen v. Saunders*, 12 Wheat. 213. And so also in England, it is settled that a creditor, who obtained a priority by legal process abroad, could not be compelled to refund to the assignees, unless he was an Englishman, acting in fraud of the laws by which he was bound: *Chevalier v. Lynch*, 1 Doug. 170; *Sill v. Worswick*, 1 H. Bl. 665; *Hunter v. Potts*, 4 T. R. 182; *Phillips v. Hunter*, 2 H. Bl. 402; *Hovil v. Browning*, 7 East, 154. Upon the same principle it has been held that an English creditor, suing upon English contract, should not be barred by a foreign discharge: *Smith v. Buchanan*, 1 East, 6; *Cleve v. Mills*, 1 Cooke's B. L. 303; *Waring v. Knight*, Id. 307; *Richards v. Hudson*, 4 T. R. 187. Other British authorities cited by counsel on the same point are: *Ogilvie's case*, 2 Dow, 236; *McIntosh v. Ogilvie*, Chan. t. Hardw., cited in 4 T. R. 193; S. C., 3 Swanston, 366; *Solomons v. Ross*, cited in 1 H. Bl. 131; *Neal v. Cottingham*, Id. 132, *in notis*; *Thorold v. Forest*, 2 Dow, 237; *Jollet v. Deponthieu*, 1 H. Bl. 132, note; *Ballantine v. Goulding*, 1 Cooke's B. L. 515; *Ex parte Frank*, Id. 336; *Quin v. Keefe*, 2 H. Bl. 553; *Davison v. Fraser*, 2 Dow, 237; *Pedder v. McMaster*, 8 T. R. 607; *Strothers v. Reid*, 2 Dow, 237; *Potter v. Brown*, 5 East, 124; *Selkrig v. Davies*, 2 Rose, 291; S. C., 2 Dow, 230; *Ex parte Cridland*, 3 Ves. & B. 94; *Birchwood v. Miller*, 3 Meriv. 279.

Shaw and Aylwin, contra.

By Court, PARKER, C. J. The person summoned as trustee in this case, admits himself to be indebted to Williams, the defendant in the action, but objects to being charged as trustee, on account of the bankruptcy of Williams in England, and the assignment of his estate and effects by the commissioners appointed according to the laws of that country, which assignment he supposes transferred this debt to the assignees, and thus that it is taken out of the operation of our trustee process.

This process was served after the commission of bankruptcy

issued, and after the assignment made by the commissioners, but before any notice thereof was given to the plaintiff in the action, or to Marshall, the supposed trustee.

By our law the service of a trustee process upon one who is indebted to the defendant in the suit creates a lien upon the debt in favor of the plaintiff in the action; so that if he recovers judgment against the principal he shall have execution against the trustee to the amount of the effects in his hands, or the debt which he owes, and no distinction is made in the application of this law, between citizens who may be trustees of other citizens and those citizens who may be indebted to a person residing in a foreign country who is indebted to citizens of the United States. Nor is the benefit of the law confined to citizens of the United States, for foreign merchants coming here and finding property or debts of their debtors here, may attach them as our own citizens may. The plaintiff, therefore, has a right to an adjudication against Marshall, as the trustee of Williams, unless the bankruptcy and proceedings under it have transferred this debt to the assignee, so that in effect Marshall was not the debtor of Williams, but of the assignees of Williams, at the time of the service of the writ. In regard to goods and merchandise belonging to a foreign bankrupt or insolvent person found here, if attached before any possession is taken by the assignees, whether under a commission of bankruptcy or otherwise, the attaching creditor would hold, because delivery, either actual or constructive, is necessary to complete the transfer; but in regard to choses in action, as debts due to the bankrupt, the mere assignment, if valid in law, passes the property, because they are incapable of delivery, and notice to the debtor is not essential to the transfer, otherwise than to protect him in case he should pay over to his creditor after the assignment without notice.

This case raises a question which has been treated by various judicial tribunals as of great magnitude, and as of a general and national, rather than a municipal character; and such is the difference of opinion among learned judges and eminent jurists, that it is difficult to affirm where the weight of argument lies. Our duty, however, does not require us to enter much into the discussion of the general principles which may be supposed to affect the question; we shall rather look for authority, because, if there is a received and settled law upon the subject, we shall feel ourselves bound to observe it, although we might think that the improved state of the world in regard

to its commercial relations requires a more liberal system than that law sanctions; for it is not for one out of a cluster of states, whose jurisdiction is limited in its objects, to affect to improve its jurisprudence by the introduction of rules supposed to be called for by enlarged policy in regard to objects of a general nature. Such changes, if within judicial power, should be wrought by the supreme court of the nation; and, if not, by other constituted authorities of the nation, either by treaty with foreign powers, or by legislative enactment. We must be allowed, therefore, to discharge ourselves of this case on narrower grounds than its importance, or the very elaborate argument with which we have been favored, would seem to require.

Does, then, a commission of bankruptcy in England, and an assignment of the bankrupt's effects under it, so transfer a debt due to the bankrupt from a citizen of this state to the assignees, that another citizen, who is a creditor of the bankrupt, can not seize it on a trustee process and secure it to himself?

We think it very clear that this question has not been settled in the affirmative in this state, nor in any other state in the Union, nor in the supreme court of the United States, but, on the contrary, that whenever the question has been raised, it has been determined in the negative. With respect to our own state, the question has not been settled either way directly, though there are some cases in which it has incidentally occurred; but from these nothing favorable to such assignments can be inferred.

An expression of Chief Justice Parsons, in the case of *Goodwin v. Jones*, 3 Mass. 517 [3 Am. Dec. 173], is relied upon. Too much stress is laid upon that expression, considering that it is rather a statement of the argument of counsel, which he is undertaking to answer, than an opinion of his own. He says: "It is admitted that the assignee of a bankrupt, duly appointed pursuant to the laws of the state where the bankrupt dwells, may maintain an action in that character in any other state, the laws of which are not repugnant to his recovery." Now, the very question here is, whether the laws of this state are not repugnant to his recovery; and this cautious qualification of the admission has at least as much bearing as the admission itself. But even if the admission were unqualified, as the question supposed to be involved in it was not before the court, it could not be received as authority.

The case of *Dawes, Judge, v. Boylston* [6 Am. Dec. 72], is cited for the assignees, but if anything touching the question is to be

inferred from that case, it is, that the assignment under a commission of bankruptcy has no effect against the creditors of the bankrupt here. Neither do we see anything in the case of *Blanchard v. Russell* [7 Am. Dec. 106], *Baker v. Wheaton* [4 Am. Dec. 71], or *Watson v. Bourne* [6 Am. Dec. 129], which sustains the position advanced by the counsel for the assignees, viz., that the assignment under a foreign commission of bankruptcy transfers the property and debts of the bankrupt here, so as to prevent an attachment by our creditors. The question in all those cases related only to the effect of a discharge under the laws of the state where the contract was made, upon the demand of a creditor when sued in another state. Observations which might have fallen from judges in the course of the opinions given by them, of a more general nature than the subject required, can not be considered as authorities. It is the point decided which becomes the precedent; what is said *arguendo* by a judge, ought to have little if any more weight attached to it than if said by counsel. It would be altogether unjust to give to remarks of the kind the force of judicial decisions. We do not perceive, however, in any of the cases cited, even an intimation that the property of a bankrupt in this country, or his debts here, passes to his assignees in a foreign country by force of the assignment under the commission.

In regard to the case of *Blanchard v. Russell* [7 Am. Dec. 106], which has frequently been referred to in the argument of the counsel for the trustees, it should be remarked, that the principal question discussed is the constitutionality of state insolvent laws; whether they so impaired the force and obligation of contracts as to come within the prohibitory clause of the constitution of the United States. It is true, in the opinion delivered, the position was attempted to be maintained, that contracts were to be interpreted and construed by the existing laws of the state within which they were made; and also, that what would operate a legal discharge of the contract in that state, would have the same effect elsewhere; and hence it was intimated, that an American citizen, who should become creditor of an English merchant by a contract made in England, might be barred of his debt, by a certificate of discharge duly obtained under a regular commission of bankruptcy in England. This position has been questioned, and so far as any judicial decision can be predicated of the case of *Ogden v. Saunders*, 12 Wheat. 213, it may be considered to be overruled; for although in that case the legal effect of a state insolvent law is to a certain extent admitted,

yet this effect is limited by the decision to cases between parties who are both citizens of the state where the law is enacted, and to suits brought in the courts of that state. But whether this court were right or wrong in the position so laid down, it does not follow that assignments of the commissioners would so divest the property of the bankrupt that it would cease to be subject to our attachment laws. The case supposed is of a particular creditor, who by reason of the nature and locality of his contract might be deprived of his debt by a plea of a certificate of discharge, upon the ground that he is virtually a party to the commission, leaving untouched the case of an American creditor whose debt was not so situated, and who had by virtue of our statutes acquired a lien by attachment, or under the trustee process.

On the other hand, the case of *Ingraham v. Geyer*, 13 Mass. 147 [7 Am. Dec. 132], in quite unambiguous terms asserts the right of an attaching creditor within our jurisdiction, he being a citizen of this state, as paramount to the right of assignees claiming by virtue of a transfer from the debtor himself in another state. This case has been sometimes cited in this court and elsewhere, as having decided that in all circumstances an attaching creditor here would prevail over the assignee of the debtor under a transfer made abroad; but we do not think it was intended, or that it does in its terms go to that extent. The assignment set up was clearly void according to the law of this state. It was said it was valid in Pennsylvania, where it was made; the court said, admit it to be so, nevertheless it would not be received here as valid against our citizens, because it was unjust and unequal in its effect upon them. The meaning was, that though by comity the laws of other states, and contracts made under them, are to be received and allowed here, yet this case would come within the acknowledged exception to that general rule, viz., that our own citizens should not be prejudiced thereby. It was certainly not intended to decide, that a *bona fide* transfer by a debtor abroad to his creditors, or to trustees for their use, in such form as would be valid to pass the property if made within this state, would be set aside for the benefit of creditors who had acquired no lien until after the making of such assignment. And, therefore, we do not think a decision against the operation of an assignment by commissioners under the bankrupt laws of England, draws after it the inference, that an assignment made by the debtor himself without the intervention of a commission of bankruptcy, if such assignment were

lawful in the place where made, would be unavailing. In regard to the intimations given in the case of *Dawes, Judge, v. Head*, 3 Pick. 128 (2 ed. 148, note 1), which are thought by counsel to be applicable to the case before us, it should be considered that that was a case of insolvency recognized by our statutes, and for which an equal distribution is provided among the creditors. The desire of the court was, that the foreign creditors should share in the distribution, instead of applying the whole effects found here to the payment of our own citizens. There was no attachment law to interfere, and the way seemed to be open to introduce a liberal system for the settlement of estates of deceased insolvent persons; but it was supposed to be a necessary part of that system, that the effects found here should be here distributed in just proportion to the whole property and all the debts; whereas the effect of the principle contended for in this suit, is to break down the attachment law and transfer all the effects to a foreign country, to be there distributed, much to the inconvenience certainly of some, if not all, the creditors of the bankrupt here.

There being no case in Massachusetts which can sustain the claim of the assignees of the bankrupt, we have examined the reports of adjudicated cases in other states, in order to ascertain what the law is among them, and with the exception of the case of *Holmes v. Remsen*, 4 Johns. Ch. 460 [8 Am. Dec. 581], it may be safely asserted, that not one out of the numerous state courts has adopted the doctrine sought to be maintained in defense of this suit.

In North and South Carolina,¹ in Virginia, and in Pennsylvania and Maryland, it has been expressly decided that such assignments have no efficacy against attachments made within their several jurisdictions; and if in some of those states these decisions have been founded upon particular legislative enactments, it is very certain that, in regard to Pennsylvania,² the opinion of the court was the result of a deliberate and learned discussion of general principles of jurisprudence, as well as a critical examination of most of the important decisions in England upon the subject.

In addition to this, there is the strong, unqualified assertion of Chief Justice Marshall, speaking for the court, in the case of *Harrison v. Sterry*, 5 Cranch,³ that "foreign bankrupt laws do not operate to transfer the property of bankrupts within the

1. *McNeill v. Colquhoun*, 2 Hayw. 24; *Robinson v. Crowder*, 4 McCord, 529 [17 Am. Dec. 762].

2. *Milliken v. Aughinbaugh*, 1 P. & W. 117.

3. 5 Cranch, 289.

United States." This decision, it is true, has been found fault with, as not being accompanied with any reasoning tending to show its correctness. It can hardly be supposed, however, that it slipped inadvertently from a mind so unapt to entertain or promulgate loose opinions, as that of Chief Justice Marshall, and that its unsoundness should also have escaped the attention of the other acute members of that court. It ought rather to be supposed that it was considered a maxim too well supported by authority, and too well known in practice to require the support of argument. And I am inclined to think, that were it not for the profound and captivating discussion of Chancellor Kent, in the case of *Holmes v. Remsen* [8 Am. Dec. 581], the truth of the maxim, as stated by Chief Justice Marshall, would not have been called in question.

In regard to the last-mentioned case, it can not be considered as settling the law even in New York. The most that can be made of it is, that it gives the opinion of a most accomplished and enlightened jurist in favor of the position, he sitting in chancery, not feeling himself shackled by the technical rules of the common law, and feeling a generous ambition to introduce into the code of the state with which his name is identified, a broad and liberal rule fit for the government of the whole mercantile world, of which no man is better suited than himself to be the legislator. I scruple not to say that the principles which he advances, and the system which he wished to enforce, ought to belong to the code of nations, and that it would be happy if, by treaty between this country and the civilized nations of Europe, the principles which received his powerful support should be made to constitute a branch of the *jus gentium*, and that a place for its execution with fairness and reciprocity should be adopted; but until that shall be done there seem to be insuperable difficulties in the way of a partial adoption of it by one country, or, rather, by one small section of the country, when the greater part of the rest of the world might repudiate it. I will only refer to the very able argument of a sound common lawyer, Mr. Justice Platt, of the same state, to show the improbability that the opinion of Chancellor Kent will be adopted as the law of the state of New York.

And we may now conclude, as that eminent man himself has done in his recent work, which does himself so much honor and the public so much good, that the American law is decisively in opposition to the opinion which he maintained in the case of *Holmes v. Remsen* [8 Am. Dec. 581]. And thus ought this case

to be settled, for we can not receive the law of any foreign country; and however well disposed the English courts may be to adopt a more enlarged and liberal system, and however successfully the recent decisions in that country may have contributed to that end, we do not think ourselves at liberty to follow in a train which partakes so much of judicial legislation. Down to the time of our revolution, we think the adjudications in the courts of law in England would fully justify the position laid down by Chief Justice Marshall in the case of *Harrison v. Sterry*, viz., that foreign bankrupt laws do not operate to pass the property of bankrupts in other countries. It was certainly so in the time of Lord Mansfield, and no one will deny him the credit of being willing to liberalize the law in all matters relating to commerce or the intercourse of merchants.

In the case of *Cleve v. Mills*, tried before him at the Cockpit, he is stated to have said that the statutes of bankruptcy do not extend to the colonies or any of the king's dominions out of England, but the assignments under such commissions are considered as voluntary, and as such can take place between the bankrupt and the assignee, but do not affect the rights of any other creditor: 1 Cooke's B. L. 243.

And in the case of *Le Chevalier v. Lynch*, the whole court of king's bench affirmed the same doctrine. A creditor of the bankrupt, against whom a commission had issued in England, attached a sum of money in the hands of a debtor of the bankrupt in St. Christopher, an island within the British dominions, and this attachment was held good. Lord Mansfield says if a bankrupt has money due to him out of England, the assignment under the bankrupt laws so far vests the right to the money in the assignees that the debtor shall be answerable to them. But if, in the mean time, after the bankruptcy and before payment to the assignees, money owing to the bankrupt out of England is attached *bona fide* by regular process, according to the law of the place, the assignees in such case can not recover the debt: Doug. 161. And the same principle is affirmed by the same eminent judge in the case of *Waring v. Knight*, 1 Cooke's B. L. 307.

Now this was the law of England down to 1768, and therefore the law of this country. I do not know what can be said in answer, unless it be that though the laws of the colonies, and of other countries, did not recognize the English statutes of bankruptcy, and therefore the English courts were obliged to give effect to the judgments which took from their operation

the effects of bankrupts, yet nevertheless this was wrong, and that the courts of other countries ought to adopt a more liberal principle. But however satisfied we may be of this admonition, certainly on the question what is law, it can not be suffered to have any influence.

The Scotch courts, until a comparatively recent period, understood the law as Lord Mansfield did, and uniformly gave preference to their arrestments over the assignments of commissioners under the English bankrupt laws, as appears by the case of *Thorold v. Forest*, 2 Dow, 237, and some other Scotch cases which have been cited. During this time, however, the law must be considered as quite unsettled in England, or else the courts of common law and chancery proceeded upon very different principles; for in the year 1769, in the case of *Jollet v. Deponthieu*¹, and *Solomons v. Ross*², in the year 1764, full effect was given in the court of chancery to a process similar to a commission of bankruptcy in England, by allowing the creditors of the bankrupt's estate to recover a debt from an English subject, although it had been attached after the appointment of curators, by another English subject. This was certainly contrary to Lord Mansfield's doctrine, that a commission of bankruptcy does not reach beyond the jurisdiction where it issued. It is probable, however, that it was not of right, but of comity, that this proceeding was had. The neighborhood of Holland, its intimate connection with England in commerce, and the actual or expected reciprocity in regard to English commissions of bankruptcy, without doubt influenced the opinion of the chancellor; for, if it was considered as the necessary result of legal obligation, how is it to be accounted for, that in 1779, the same high court, held by commission, should have decided that the assignment did not divest the property of the bankrupt, as the debt was due in the plantations, but that it only gave the assignees the right to sue for it; that the creditor in Rhode Island, a British province at the time of the transaction, had also a right to sue, and by his judgment had obtained a priority? The true reason for this contrariety of decision is the one, probably, stated by the lords commissioners, viz., that in the case of *Solomons v. Ross* and *Jollet v. Deponthieu*, which were Dutch bankruptcies, "there were bankrupt laws in Holland, but none in the plantations." Thus intimating, that where there would be reciprocal advantages, the proceedings in the foreign commission would by comity be allowed to operate in England.

1. 1 H. Bl. 132, note.

2. 1 H. Bl. 131, note.

It would be useless to go over the numerous decisions which have taken place in England since our revolution, it being very obvious that there has been a gradual extension of the legal effect and operation of commissions, until at last it has got to be the opinion of very eminent judges, as it is that of Chancellor Kent, that they are universal in their operation, within the united kingdom and without, and that all the property of the bankrupt, wherever situated, is transferred by the assignment; and so strong is the opinion in the minds of some eminent judges, that they hardly deem any nation entitled to the appellation of civilized, which does not admit and enforce the same doctrine.

They first began by obliging the English creditor, who had possessed himself of the property of the bankrupt in a foreign country, to refund to the assignees; and this is wholly unobjectionable; for, being a subject of the laws, he ought not to be allowed an advantage over creditors of the same country, but should be considered as the agent of the assignees in collecting the effects of the bankrupt.

I believe this is the whole extent of any English adjudications, for all beyond is only the expression of very strong opinions by individual judges: *Sill v. Worswick*, 1 H. Bl. 615;¹ *Hunter v. Potts*, 4 T. R. 182; *Ex parte Frank*, 1 Cooke's B. L. 336, and many other cases. The Scotch courts have followed the English, as was to be expected, considering the almost nominal independence of their judiciary upon that of England. There is no case in which the right of a foreign country to deny this full effect to English commissions has been questioned; so that after all it is a mere question of comity, which will be determined by the courts of every nation according to those circumstances existing there, which ought to affect a question of that kind. It can not be considered a principle of universal law which every nation is bound to recognize. In Holland and France, where there are bankrupt laws, it is without doubt convenient to give effect to the bankrupt laws of England, she reciprocating the indulgence. The daily intercourse between those countries, and their proximity, render it quite easy for the creditors of each to prosecute their claims in the tribunals of either; and if there were a bankrupt law in the United States, such is the increased facility of communication with England, that in many cases it would not be very inconvenient for merchants in either country to transmit their claims to the other. But the want of such laws here seems to remove all ground of

1. 1 H. Bl. 655.

reciprocity. If the merchant of New York or Boston becomes insolvent, having property or debts in England, the English creditor may avail himself of them without being subject to refund or distribution. But giving force to the English bankrupt laws here would deprive the American creditor of the right of priority secured to him by the laws of his own state or country. And then again, if this is a matter of law, of right, and not of comity, it must be exercised towards the most distant as well as towards the nearest nations, towards Russia and the British dominions in India, as well as towards the island of Great Britain; and great inconveniences can not but suggest themselves as arising out of this broad and universal system. It may be well at some future time, when there shall be bankrupt laws here, to accept the proffer of Great Britain, France, or Holland, to reciprocate the benefits of such a system; but we are persuaded, if such a change shall take place, it must be under the auspices of the national legislature, or the national courts, or of some treaty with the commercial nations of Europe, and not by the adjudications of a court of one out of the numerous governments which compose the United States.

It is asked, whether we should not give force to the assignment of property here by its owner abroad, when the object is to pay or secure particular creditors to the prejudice of the rest. An affirmative answer to this question does not involve the necessity of giving the like force to assignments under a commission of bankruptcy. The former would be consistent with our laws and our practice; it is merely acknowledging the personal right of the proprietor to dispose of his effects for honest purposes. The latter is yielding to the law of another country, which we are not obliged to do, and can not without establishing a law in Massachusetts which is not recognized anywhere else in America. We do not deny the principles which attach themselves as maxims to personal property: that it has no *situs*, follows the person of the owner, and at his death is to be distributed according to the laws of the domicile of the owner. But the relation of debtor and creditor, and the rights of the latter over the effects of the former, are distinct objects of jurisprudence within the control of the legislative power of the country where the property is. This power is absolute and uncontrollable; it may be unreasonably exercised, but still it is legal, if so willed by a sovereign, independent power, for the dominion is here. Such was the law of England; before, upon principles of comity only, the code was accommodated to the

mercantile situation of that country, and even now doubts occasionally spring up in the minds of great judges, whether the new system rests upon a solid basis; for as late as the year 1817 we find that great jurist, Sir William Grant, hesitating between the old and the new principle, and manifesting a strong inclination towards the opinion of Lord Chief Justice Eyre, who dissented from the other judges in the case of *Phillips v. Hunter*,¹ *Birchwood v. Miller*, 3 Meriv. 279.²

In this state of things, the principle having been applied in England as yet only to cases arising in countries where bankrupt laws or something equivalent exist, it having been nowhere adopted in America except in the solitary instance of the chancery decision in New York, and having been expressly rejected by one tribunal of paramount authority, and another of the highest respectability, we think it would be presumptuous in this court to open the acknowledged code to the reception of a rule, which, however reasonable and beneficial, if universally admitted, would be likely to produce embarrassment and inconvenience if so partially introduced.

With respect to the other ground upon which it is suggested that the trustee ought to be discharged, viz., that the debt he owes to Williams was contracted in England, and is payable there only, so that he could not, and, therefore, the present plaintiff can not make it payable here, we do not perceive any legal principle upon which the objection rests. It is a common mercantile debt, arising from acceptances and advances, for which no funds were provided, or, if provided, were not realized. This was a debt from Marshall everywhere, in whatever country his person or property might be found. A suit might have been maintained by Williams here, and, therefore, the debt may be attached here. The cases cited in support of this objection do not apply. That of *Maine F. & M. Ins. Co. v. Weeks*, 7 Mass. 438, only decides that there must be a right of action in the principal against the trustee to sustain the process, and we think there clearly was in this case; and that of *Clark v. Moody*, 17 Mass. 145, regards only the liability of a factor to an action, where goods are received by him on consignment.

We see no reason, therefore, why the trustee in this case should not be charged.

ASSIGNMENT UNDER FOREIGN BANKRUPT LAWS: See *Holmes v. Remsen*, 8 Am. Dec. 581, and note; S. C., 11 Id. 269; *Milne v. Moreton*, 6 Id. 466, and note.

1. 2 H. Bl. 402.

2. *Birchwood v. Miller*, 3 Meriv. 279.

CUTLER v. WINSOR.

[6 PICKERING, 335.]

WHERE A VESSEL IS CHARTERED WITHOUT ANY LIMITATION of time, it is an indefeasible hiring for every voyage undertaken before notice from the owner of his intention to put an end to the contract.

PARTNERSHIP IN SHIPPING VENTURE.—Facts held not to render a charterer and owner partners.

ASSUMPSIT against the defendant, as owner of the schooner Alexander, for certain goods shipped on board by the plaintiffs at Boston, to be carried to Alexandria, she being then commanded by Jesse Snow. The defense was that Snow was then charterer of the vessel, and constructive owner *pro hac vice*. To support this position, the defendant produced the deposition of Snow, originally taken on behalf of the plaintiffs, to which was annexed the agreement between the defendant and Snow regarding the use of the schooner, the material portion of which was as follows: “The said Capt. Snow having agreed to take the said schooner Alexander for the purpose of getting employ in the freighting business, doth, by these presents, promise and oblige himself to victual and man the said schooner, and pay one half of all port charges and pilotage, etc. And I, the said Winsor, do promise, on my part, to put such schooner in sufficient order for such business, with sails, rigging and tackling, likewise to pay one half of the port charges, pilotage, etc., together with eight dollars per month for one man’s wages; and it is understood that all moneys so stocked in said schooner, whether for freight or passage, or whatever shall be equally divided between the said Capt. Snow and Winsor, each party accounting for the above.” Snow deposed that he went to hire the vessel; that he was to have half of the net earnings for the use of her; and that, as master, he was to have eight dollars a month instead of commissions; that he made the contracts with the shippers of goods, and that the defendant gave him no orders about the destination or employment of the vessel; and that the defendant had requested deponent to write to him from time to time, to let him know where the vessel was, where the deponent was going, and what was his business.

Verdict of the defendant, subject to the court’s opinion.

F. Dexter and Washburn, for the plaintiffs, contended that a partnership existed between Snow and the defendant: *Gow on Partn.* 16, 17; *Mortag. on Partn.* 7; *Hamper, Ex parte*, 17 Ves. 404; *Grace v. Smith*, 2 W. Bl. 998; *Waugh v. Carver*, 2 H. Bl.

235; *Cheap v. Cramond*, 4 Barn. & Ald. 663; *Langdale, Ex parte*, 18 Ves. 300; *Hesketh v. Blanchard*, 4 East, 144; *Purviance v. McClintee*, 6 Serg. & R. 259; *Smith v. Watson*, 2 Barn. & Cres. 401; *Sylvester v. Smith*, 9 Mass. 119; *Mumford v. Nicol*, 20 Johns. 611.

C. G. Loring, contra, cited *Dry v. Boswell*, 1 Campb. 329; *Mair v. Glennie*, 4 Mau. & Sel. 343; *Rice v. Austin*, 17 Mass. 205; *Muzzy v. Whitney*, 10 Johns. 226; *Jackson v. Robinson*, 3 Mason, 138; *Wilkinson v. Frasier*, 4 Esp. 182; *Baxter v. Rodman*, 3 Pick. 435.

PARKER, C. J. In the case of *Reynolds v. Toppan*, 15 Mass. 370 [8 Am. Dec. 110], it was determined that the owner of a vessel under charter, the hirer having the whole control of the vessel for the time, to victual and man her and pay over a portion of the net proceeds to the owner for the use of the vessel, was not liable to the shippers of goods on board the vessel, which had been embezzled or otherwise not accounted for by the master. In that case the English authorities cited on the present occasion were duly considered by the court, and therefore will not be commented upon; and in the case of *Taggard v. Loring*, 16 Mass. 336 [8 Am. Dec. 140], the same principle is recognized, and is applied to a contract of hire of the vessel which existed only in parol. So that the inquiry in the present case can be only, whether there exist any circumstances which distinguish it from those which have been thus decided.

And first it is insisted that in the cases decided, the letting the vessel was for a certain determinate period; in one case for six months, and in the other for the season; whereas in the present case there is no provision for the duration or the termination of the contract.

It is not perceived that any difference in regard to the liability of the parties can result from this circumstance, for although the contract was determinable at the will of the owner of the vessel, yet, as in other contracts of a similar nature, this right is subject to the qualification that it could not be rescinded while the vessel was actually employed in business pursuant to the contract; so that it was an absolute and indefeasible hiring of the vessel for every voyage she should have undertaken until notice was given by the owner of his intention to discontinue it.

The principle of ownership *pro hac vice* by the hirer would apply to every voyage undertaken by him before he should

receive notice from the owner that he chose to terminate the contract. For this we cite no authority, for no case like the present has been found; but it results from the nature of the contract and the rights of the party under it, and is analogous to the case of leases at will of real estate, which can not be terminated but by mutual consent, unless the lessor gives reasonable notice to quit.

It is also thought that the clause in the agreement, which provides that the defendant, the owner, shall be accountable for the wages of one man, at eight dollars per month, constitutes a substantial difference between this and the cases decided; but, on reflection, we consider this only as a means of ascertaining the charges upon the earnings before a division shall be made between the charterer and the owner. It is no more than if the parties had agreed that the earnings should be divided, except that eight dollars per month should be deducted from the defendant's share.

As to the question of copartnership between the defendant and Snow in the employment and earnings of the vessel, we think it can not be predicated on the facts appearing in the case, any more than in all the cases in which the charter of the vessel was agreed to be paid by a portion of the earnings.

Judgment according to verdict.

AMHERST ACADEMY v. COWLS.

[6 PICKERING, 427.]

IT IS A SUFFICIENT CONSIDERATION for a promissory note that it was given to the trustees of a charitable institution, after a subscription for charitable purposes, payable to such trustees, the note reading for value received, and expressly referring to the subscription whose purposes were in process of execution.

POWERS OF CORPORATION.—Trustees of an academy incorporated "to promote morality, piety and religion, and for the instruction of youth in the learned languages, and in such arts and sciences as are usually taught in other academies," may procure subscriptions and take promissory notes to constitute a fund for the purpose of founding an institution "for the classical or academical and collegiate education of indigent young men, with the sole view to the Christian ministry," to be incorporated with the academy.

AN ASSIGNMENT OF THE NOTES by the trustees to a distinct college having power to receive the fund is a valid transfer of the notes.

THE TRUSTEES OF THE ACADEMY were the proper parties in whose name to bring the action on the notes, they not having been indorsed.

ASSUMPSIT on the following promissory note: " July 14, 1819. For value received, I, the subscriber, of Amherst, etc., promise to pay to the trustees of Amherst academy, or their order, on or before the twenty-third of May, 1820, one hundred dollars, with annual interest from and after the twenty-third of May, 1819, being the amount of my subscription to the charitable fund established in Amherst for the classical education of indigent pious young men, and in pursuance of my covenants and engagements, as expressed in the constitution of said fund by me subscribed, and dated the twenty-third of May, 1818. Jonathan Cowls." General issue pleaded. The original subscription paper was offered in evidence. The constitution referred to was for the purpose of founding an institution for the instruction of youth in the branches of literature and science usually taught in colleges, to be located in Amherst and incorporated with the academy of that place. The second article was as follows: " In order to effect the benevolent object aforesaid, we, whose names are hereunto subscribed, severally and solemnly promise to pay to the trustees of Amherst academy for the time being, or to their successors in office, the sums annexed to our respective names, for the purpose of raising a permanent fund of the amount of at least fifty thousand dollars, as a basis of a fund for the proposed institution, the interest of which is to be appropriated in manner hereinafter provided, to the increasing said fund, and for the classical or academical and collegiate education of indigent young men of promising talents and hopeful piety, who may desire such an education, with the sole view to the christian ministry, etc., provided that in case the sums subscribed to this instrument in the course of one year from the date hereof, shall not amount to the full sum of fifty thousand dollars, then the whole or any part thereof shall be void, according to the will of any subscriber, he giving three months' notice, etc., and within three months after the expiration of the year." The fifth article provided that until the incorporation of the proposed institution, its property and management should be under the control of the trustees of Amherst academy; and that upon such incorporation, the trustees of the academy should without loss of time transfer to the trustees of the institution all the property, with evidences and titles of the same. Defendant introduced a deed of assignment transferring, among other things, the note in suit from the trustees of Amherst academy to the trustees of Amherst college.

The Stat. 1824, c. 84, establishing a college in Amherst, in

sec. 5, authorizes the trustees "to receive all the real estate, goods, chattels, choses in action, and property of every description whatever, which has, heretofore, been given, etc., or engaged to be given, paid, or devised to the trustees of Amherst academy, with the intent and for the purpose of establishing and maintaining a classical or collegiate institution in said town, and that all the said funds, etc., shall be faithfully and forever used and appropriated according to the will of the donors." Section seven provided that such assignment should be made within eight months, or the act to be void. The Stat. 1815, c. 102, establishes an academy in Amherst, for the purpose of promoting morality, piety and religion, and for the instruction of youth in the learned languages, and in such arts and sciences as are usually taught in academies, or as shall be directed by the trustees.

It was contended by the defendant that this action could not be maintained: 1. Because there was no sufficient legal consideration for the promise; 2. Because the trustees of Amherst academy could not become the payees of a note given for the purposes expressed in the note and subscription paper; 3. Because the note was transferred to the Amherst college, and the suit should have been brought in their name. For the purposes of the trial, all these points were ruled against the defendant, and the jury were instructed to find a verdict for the plaintiffs. Verdict accordingly, subject to the opinion of the whole court.

C. A. Dewey, for the defendant, on the first point raised, cited *Bann v. Hughes*, 7 T. R. 350, note; *Burnet v. Bisco*, 4 Johns. 235; 1 Saund. 211, note 2; *Pearson v. Pearson*, 7 Johns. 26; *Phoenix Ins. Co. v. Figuet*, Id. 383; *Schoomaker v. Roosa*, 17 Id. 304; *Fink v. Cox*, 18 Id. 148 [9 Am. Dec. 191]; *Fowler v. Shearer*, 7 Mass. 14; *Boutell v. Cowdin*, 9 Id. 254; *Phillips Limerick Academy v. Davis*, 11 Id. 113 [6 Am. Dec. 162]. On the second point: *First Parish in Sutton v. Cole*, 3 Pick. 240.

Bates, contra.

By Court, PARKER, C. J. The first objection to the verdict is, that no sufficient legal consideration for the note declared on was proved. As a consideration is expressly admitted in the note itself, the defendant, to avoid payment, must prove that, contrary to his admission, no value or consideration was in fact received. It seems that an actual benefit to the promisor, or an actual loss or disadvantage to the promisee, will be a sufficient consideration to uphold a promise deliberately made.

Whether the consideration received is equal in value to the sum promised to be paid, seems not to be material to the validity of a note, though in some cases it is held that where there is a mistake as to the value for which the promise is made, or a partial failure of the consideration, the jury may on trial give a less sum than is purported to be due on the face of the contract. And this has been recognized as law with us. But generally the parties are to be considered as competent judges of the value of the consideration on which they make their contracts. The objection in this case, however, goes to the whole of the consideration, so that the note is either *nudem pactum* in the whole, or is valid for the whole amount.

The original consideration of the note appears in the note itself, the promisor saying: it "being the amount of my subscription to the charitable fund established in said Amherst for the classical education of indigent pious young men, and in pursuance of my covenants and engagements as expressed in the constitution of said fund by me subscribed and dated the twenty-third day of May, 1818." The note in suit is dated July 14, 1819, more than a year after the date of the subscription. The defendant, then, besides admitting generally a consideration under the terms "value received," specially admits that he was previously bound by a covenant and engagement voluntarily and deliberately made, with the intent and purpose of contributing to a fund which was to be appropriated to one of the most interesting and useful objects to which a man can apply the means with which Providence has blessed him, and yet he now attempts to avoid this reiterated contract on the ground that there was no legal consideration for it. The law undoubtedly allows men who have inconsiderably undertaken to bind themselves in contracts for which they have received no equivalent, to avoid such engagements by showing that they receive nothing for them, or that the party with whom such contract was made would lose nothing by the non-performance of it. And this rule of law is frequently taken advantage of by those who, without any pretense of mistake or inconsideration, have made their written promises. All that the court can do to discourage such dishonorable conduct, is to require strict and unquestionable evidence that the case comes within the rule, the burden of proof, where a consideration is expressly admitted, being altogether on the defendant.

Was there a consideration for this note when it was given? In one sense there was not; that is, the promisor had received

nothing at the time from the payees which was of any pecuniary value. But it is quite sufficient to create a consideration, that the other party, the payee, should have assumed an obligation in consequence of receiving the note, which he was compellable either at law or equity to perform, unless the promisor should be able to show, when sued, that the payee had refused, or was unable, or had unreasonably neglected to perform the engagement on his part, in which cases a defense might be raised on the ground of a failure of the consideration. The defense is not put upon that ground, and so it must be presumed that the corporate body to whom the promise was made has applied its funds to the purposes for which they were raised, or is ready and willing to do it whenever the different contributors to it shall have performed their engagements. In a court of equity of general jurisdiction they could be compelled to discharge their duty. Without such a court they would be subjected to loss of their charter by refusal or neglect, for without doubt the legislature are the visitors of all corporations founded by them for public purposes, where there is no individual founder or donor, and may direct judicial process against them for abuses or neglects which by common law would cause a forfeiture of their charters. It certainly, then, would seem that every contributor to the funds of a corporation authorized by law to receive moneys and apply them to the improvement, in most essential points, of the community to which he belongs, has his recompense in his share of the public good resulting from them; and if by means of his contribution, or his solemn promise to pay, the body to whom he has pledged his word should encounter expense, become under legal obligations, or otherwise pursue the intent and purpose of the legislature in granting them the charter, this is a sufficient legal consideration to support such a promise. In this respect the principles of common honesty can not be at variance with the law of the land. It can not be maintained that objects so important shall be frustrated, and that the agents appointed by the government to execute them shall be embarrassed and injured by the right of individuals to withdraw their contributions or refuse to comply with their promises, after the execution or during the progress of the work which they themselves set in motion. No case from the English or American reports has been cited to warrant so unjust a principle. Those which have been relied upon to sustain the defense in this case will be shown to have been wholly misapprehended, or at least to fall far short of the principle attempted here to be supported.

The doctrine contended for, that there must be a consideration for a written promise, can not be disputed, and it seems to be the general result of the authorities that, although such consideration is expressly admitted, it may be denied and proven not to have existed, in a suit between the original parties to the promise. Intimations to the contrary of this were given in the case of *Bowers v. Hurd*, 10 Mass. 427; but though the facts of that case will, upon other principles, justify the decision, the intimations in regard to the conclusiveness of the admission of "value received" are not supported in their full extent by the authorities.

The first case in our books analogous to the present is that of *Boutell v. Cowdin*, 9 Mass. 254. Unfortunately the opinion of the court in this case is stated in a much more loose manner than is usual when the subject-matter is of general import. The action was brought on a special written promise, for value received, to pay Boutell and others, deacons of the church of which the Rev. Titus T. Barton was pastor, in their coporate capacity, or their successors in office, the sum of one hundred dollars for the benefit of the church aforesaid, etc. By the facts agreed it appeared that the church spoken of in the promise consisted of the major part of the members of the church attached to the congregational society in Fitchburg, the minority having, by an ecclesiastical council, been set off into a separate church which was attached to a majority of the parish. The majority of the church, with the minority of the parish, continued together and settled the Rev. Mr. Barton as their pastor. It was proposed to raise a fund for his support by voluntary subscription, and a subscription paper was drawn up for that purpose, dated May 10, 1804, to which the defendant's intestate subscribed one hundred dollars. Afterwards the subscribers generally gave notes for the amount of their subscription; and on the the twenty-sixth of February, 1805, the note in question was given by the intestate for his subscription. The third point of defense was stated as an inference from the other two, viz.: That this was a mere voluntary understanding of the intestate without consideration. No benefit could accrue to him from the payment of the money, since the plaintiffs could not be compelled to pay it over or appropriate it to the purpose intended if they received it. Nor is there any consideration of damage to the plaintiffs, since they advanced nothing, and if they did not receive the money, they could never be called upon to pay it over. The whole opinion of the court is summed up in these few words: "That three ob-

jections had been made to the verdict in this case: 1. That the promise declared on was not binding, as being made without a valuable consideration; 2. That the deacons of the church were not, by the statute of 1785, made a corporation for the purpose of receiving and managing a fund established for the support of a minister; 3. That in this case the plaintiffs had not shown themselves to be the deacons of a church duly organized. On this last objection the court gave no opinion. But they considered the two former ones as well founded, and on both grounds they set aside the verdict."

It is quite sufficient to observe on this case, that if the second objection was sustained, to wit, that the deacons had no authority by law to receive and manage funds for the maintenance of a minister, the first of necessity must prevail; for the very purpose for which the promise was made failed, the party to whom it was made having no authority to dispose of the money to the use for which it was promised. It is not, therefore, decided in that case that a written promise made to a body legally existing and capable of applying the money, when paid, to the use intended, and compellable by law so to apply it after it has been received, is *nudum pactum*; but only that, as those to whom the promise was made were not capable in law of using the money for the purpose for which it was given, there was no consideration, and, therefore, the promise was void. We have been more particular in examining this case, because, from the brief and unsatisfactory manner in which the opinion of the court is stated, inferences have frequently been drawn from it, which, we think, the case does not warrant.

The next case which occurs in our books, in which this subject has been treated, is the *Trustees of Phillips Limerick Academy v. Davis*, 11 Mass. 113; see Rand's ed. 119, note a [6 Am. Dec. 162]. The action was assumpsit for the sum of one hundred dollars, and the evidence to support it was a subscription paper signed by the defendant and others, wherein they agree to pay, or cause to be paid, the several sums subscribed, in money or materials, for erecting an academy in Limerick. It was agreed that an academy had been built according to the terms of the subscription, and that the amount of the subscription had been demanded of the defendant. The subscription was made July 1, 1808. The plaintiffs were incorporated in November following, and the act provided that all lands, moneys, or other property already subscribed, or which may hereafter be given, assigned or transferred to said trustees for the use of the

academy, shall be received and held by them and their successors, in trust for the academy.

The objections to the recovery were: That the plaintiffs were not parties to the promise; that there was no mutuality, no consideration; and the court sustained these objections. It is stated, in the opinion of Chief Justice Sewall, that "it is a promise to give, connected with a similar promise by others to give to the same appropriation and purpose; but these promises are not mutual among the subscribers. At the most, it was a donation to come into operation at the will of each subscriber, which has not been confirmed by any act of the party charged."

It is further observed, that "the general principle is that voluntary agreements and promises, however reasonable the expectation from them, of gifts or disbursements, even to public uses, when made without consideration, are not to be enforced as contracts; but where the promise is made in consequence of anything yielded to the disadvantage of the promisee, and so where it is a proposal upon a consideration afterwards performed or gained to the promisor, this may import a sufficient consideration." It is in the conclusion stated, that if the subscriber be named or descriptively included in the grant of incorporation, and has been concerned in the subsequent proceedings, and had the advantages of a member of the corporation, the corporation may be entitled to the benefit of his subscription, and he may be answerable upon an implied promise.

This case differs from the one before us in several particulars. The action was upon a subscription paper in common form, made before the existence of the party who brought the suit upon it, and there was no subsequent act recognizing or confirming the defendant's promise. In the present case there was a subscription; but afterwards, and when the corporation was in being and activity, a promissory note, referring to the former transactions and acknowledging a value for the promise was given; and it is upon this note that the present action is brought. The cases are entirely different. Surely the plaintiffs might confide in a promise thus deliberately made; and the confession of a consideration, after a knowledge of all the circumstances, ought not to be avoided but by proof of incapacity on the part of the promisees to apply the money as was intended, or an absolute refusal or neglect on their part to do it.

The next case touching this subject is that of the *Trustees of Farmington Academy v. Allen*, 14 Mass. 172 [7 Am. Dec. 201]. It was assumpsit to recover the amount of a subscription towards

the funds of that academy. The subscription paper was drawn up and signed before an act of incorporation passed the legislature. The money was payable, by the terms of the subscription, to any persons who should be appointed trustees by the legislature. The trustees subsequently so appointed were the plaintiffs. As the case stood upon the count on the subscription paper, it was not to be distinguished from the case before cited of *Limerick Academy v. Davis*; but the money counts were added, and it being agreed, that after the incorporation, the trustees appointed a committee to erect a building, and the defendant, upon being called on for a part of his subscription, delivered on account of it some shingles to be used on the building; the court held this to be a sufficient recognition of the promise, and the plaintiffs recovered to the extent of the subscription. It was said by the court, that the case was brought within the principle of *Homes v. Dana*, 12 Mass. 192 [7 Am. Dec. 55].

The case of the *Trustees of Bridgewater Academy v. Gilbert*, 2 Pick. 579 [13 Am. Dec. 457], stands upon the subscription alone, and is therefore like the case of *Limerick Academy v. Davis* [6 Am. Dec. 162] in most respects.

On this review of the cases which have occurred within this commonwealth, analogous in any degree to the case before us, we do not find that it has ever been decided, that where there are proper parties to the contract, and the promisee is capable in law of carrying into effect the purpose for which the promise is made, and is in fact amenable to law for negligence or abuse of his trust, such a contract is void for want of consideration. On the contrary, in all the cases cited, except the first, it is decided expressly, that promises of this nature, if inefficient at first for want of a payee, or because at the time there was no actual consideration, but one in contemplation only, it is a legal basis for a subsequent promise, and that the execution of or beginning to execute the trust for which the fund is raised, forms a sufficient consideration for such subsequent promise.

We have then in the present case a subscription to a charitable fund made after the incorporation of the body who were its trustees, and more than a year after that a promissory note made for value received, payable to the same party, referring expressly to the subscription, and the purposes of it, as the consideration of the note. And we find that those purposes are in process of execution, the funds being needed for and applied to the faithful execution of the trust. We can not doubt that the note is valid, and that the defense is maintainable

neither in law nor in conscience. The party bound admits by his contract the consideration to be good and valuable, and he has shown nothing to authorize us to deny the justice or legality of the construction which he chose to put on his own antecedent engagement. The court of New York, in the case of the *First Religious Society in Whitestown v. Stone*, 7 Johns. 112, sustained the same principle.

Another objection to the plaintiff's recovering is that the corporation which they represent is not authorized by the terms of its charter to hold a fund for the purpose for which the money was raised by subscription; but on inspection of the act of incorporation, we think this objection can not prevail. The purposes of the incorporation, as described in St. 1815, c. 102, s. 1, are "to promote morality, piety, and religion, and for the instruction of youth in the learned languages, and in such arts and sciences as are usually taught in other academies." By the second section the corporation is authorized to apply property already given, or which shall be thereafter given, etc., to the above purposes, and the only limitation is that the income from the funds shall not exceed five thousand dollars. The education of pious indigent young men, for which the subscription was raised, is clearly within the meaning of the legislature in this statute.

In regard to the other objection, that the plaintiffs have assigned the note in question to the trustees of the college, we do not see any legal force in it. This transfer is authorized by statute, upon the condition that the funds shall be appropriated by the college to the same purposes as the academy were held to apply them to. It is converting the academy into a college, in the same place, and bound to execute the same purposes, and probably having better means of executing them. The deed of transfer under the sanction of the legislature operates as an assignment in equity, if not in law. The note is payable to order, but that does not prevent the assignee from suing in the name of the original promisee. It was advantageous for the defendant to be so sued, as he was thereby let in to all such defense, either in law or equity, as might avail him if the note had not been assigned.

RIPLEY v. SEVERANCE.

[6 PICKERING, 474.]

A SURETY RECEIVING FROM HIS PRINCIPAL as security property to which the latter subsequently releases to the former all right and interest for a grossly inadequate consideration, is entitled to deduct from the value of the property all sums expended under the original contract, and other *bona fide* payments, on behalf of the principal, but must account to the latter's creditors for the residue.

WHERE THE PRINCIPAL ENGAGED TO PAY AN ANNUITY, the surety was permitted to compute the value of such annuity in ready money, and retain that sum out of the property placed in his hands.

SAME.—If the parties all concerned agree, the plaintiff may relieve the surety, summoned as trustee, from his future liability in respect to such annuity.

A TRUSTEE PROCESS TO CHARGE ONE FOR LANDS, alleged to be conveyed by the principal defendant in fraud of creditors, does not lie.

TRUSTEE process. It appeared that Allis, one of the defendants, and trustee, became surety for the defendant Severance in 1818, on certain bonds, one of which was conditioned for the payment of an annuity to Hannah Martindale. The bonds were fairly made for the purposes specified in their conditions. To indemnify Allis, Severance deposited with him five notes of one Gunn, aggregating one thousand dollars, taking a written agreement for a redelivery thereof. Allis expended sundry amounts for Severance's benefit, some of the payments being in pursuance of the terms of the bond, and others *bona fide* made to Severance's creditors. In 1822, Severance discharged Allis from all notes and book accounts, gave back to him the agreement for a redelivery, and agreed that he should have as his own property the notes previously assigned to him. In 1821 Allis received a deed of land in Pennsylvania, for which Severance had given his notes. These notes Allis took up. Severance absconded in 1819, being in debt, and unsatisfied executions being in the hands of an officer against him. The notes of Gunn were all paid to Allis.

Wells, for the plaintiffs, contended that the money received on the Gunn notes having been received by Allis, he should be chargeable therefor, unless he can show clearly how he has disposed of it to exonerate himself: *Cleveland v. Clap*, 5 Mass. 201; *Sebor v. Armstrong*, 4 Id. 206; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 87; *Burlingame v. Bell*, 16 Mass. 318; *Thomas v. Goodwin*, 2 Id. 140; *Hastings v. Baldwin*, 17 Id. 552; *Dix v. Cobb*, 4 Id. 511

Grennell and Ashmun, for the trustee.

By Court, WILDE, J. As the trustee admits that long previous to the service of the plaintiff's writ upon him, divers notes were deposited in his hands as security to indemnify him against certain liabilities, it is incumbent upon him to show clearly that he has been damnified to the amount of the notes; or that the principal has *bona fide* discharged him from his liability to account for them; and if this is left doubtful, he must be charged, for no presumption is to be made in his favor.

It is admitted that the first contract, under which the notes were deposited, was *bona fide* and valid, and so it clearly appears to have been by the facts as disclosed by the trustee. He must be allowed, therefore, for all payments made or liabilities incurred by virtue of that contract; for the subsequent agreement, although fraudulent as against creditors, did not vitiate the first contract. The trustee, therefore, is to be charged with the whole amount of the notes against Gunn (one thousand dollars and interest), deducting the following payments and liabilities, viz.: 1. The sum of one hundred and sixty dollars paid to Emily Severance; 2. The sum of sixty-four dollars paid to Hannah Martindale, and, also, the sum of one hundred and eighty-four dollars secured to her by note. As to any future liabilities of the trustee to H. Martindale, the value of the annuity of forty-two dollars may be computed in ready money, having regard to the age of the annuitant; or if the parties and all concerned agree, the plaintiff may relieve the trustee from his future liability in this particular; 3. The trustee is, also, to be allowed the sum of two hundred dollars, which, as he states, he paid to the principal, being about the amount of one of the notes deposited; 4. We think, also, that the trustee should be allowed the sum of thirty-seven dollars paid to Uriah Martindale and other creditors; for although this payment was not made under the first contract, yet it was made *bona fide*, and in satisfaction of just demands against the principal; it ought, therefore, to be deducted from the funds of the principal in the hands of the trustee. These deductions being made from the amount of the notes against Gunn, the trustee must be charged with the surplus; for it is very clear that the discharge given him in 1822, was void as against creditors, and that his other claims on the trust fund can not, upon any principle, be supported. The sums of one hundred and eighty-four dollars and one hundred and sixty dollars were paid for the land in Pennsylvania conveyed by Peck; and the note for seventy-two dollars was with-

out consideration, and was, therefore, rightly given up. The note for forty dollars, also, given by the trustee on the settlement in 1822, was without good consideration, or rather the consideration has failed, as the creditors of the principal see fit to set aside that settlement.

As to the land in Pennsylvania, the trustee can not be charged upon the facts disclosed. It does not appear that the present value of the land exceeds the sum paid for it by the trustee; and it can not be presumed; but if it could, the trustee would not be liable in this process.

Trustee charged.

CASES
IN THE
SUPREME COURT
OF
NEW HAMPSHIRE.

DOW v. NORRIS.

[4 NEW HAMPSHIRE, 16.]

THE RIGHT OF AN INDIVIDUAL TO A PENALTY incurred under a statute is a civil cause within the meaning of the constitution, and can not be taken away by a repeal of the statute.

TRESPASS for an assault and imprisonment. The cause was submitted upon an agreed statement of facts. The defendant being the commanding officer of a company of militia, on the twentieth of October, 1819, issued his warrant to collect a fine of two dollars of the plaintiff for his non-appearance at a muster of the company, on the thirtieth of June, 1819. The plaintiff was arrested by virtue of the warrant on the first day of November, 1819, and detained until the third day of the same month, and until he paid two dollars and seventy cents, the amount of the fine and costs. The plaintiff, before and at the time of the said muster, lived within the limits of the company, was duly enrolled therein, and was legally notified to attend the muster, and did not attend. If the court were of opinion that the action could be maintained, judgment should be rendered for the plaintiff for three dollars damages and costs; otherwise judgment should be rendered for the defendant.

Merrill, for the plaintiff.

Sullivan, *contra*.

By Court, **RICHARDSON, C. J.** It is not disputed in this case that a forfeiture of two dollars was incurred by the plaintiff on the thirtieth of June, 1819. By the laws then in force it was pro-

vided that the forfeiture should be "levied by distress and sale of the offender's goods and chattels, by warrant under the hand and seal of the captain or commanding officer of the company:" 1 N. H. Laws, 299 and 309. And that all fines recovered, except that part which accrued to the sergeant who collected the same, should be paid into the hands of the commanding officer of the company, to be expended in defraying the necessary expenses of such company, as the commissioned officers of the same might direct: 1 N. H. Laws, 300.

The next day after the forfeiture was thus incurred, the statute of July 1, 1819, was passed, the first section of which enacts "that the several laws heretofore made for arranging, forming, and regulating the militia, be and hereby are repealed; provided, nevertheless, that all officers actually in commission agreeably to the laws which are hereby repealed, shall continue in commission in the same manner, and in the same authority they would in case the said laws were still in force; and that all proceedings done and transacted by virtue of said laws shall be good and valid in the same manner as if said laws were not repealed." The ground on which the plaintiff rests his cause is that the law under which the forfeiture was incurred having been repealed without any saving clause extending to forfeitures not actually paid, there was no law in existence authorizing the warrant of distress at the time it issued.

To this it is answered by the defendant that to give this construction and operation to the repealing act, would, with respect to this forfeiture, make it a retrospective law for the trial of a civil cause, and repugnant to the constitution; and that therefore such a construction of the repealing act is altogether inadmissible. As the constitution is the supreme law of the state to which all statutes must in every conflict yield, and as we are bound so to construe every act of the legislature as to make it consistent, if it be possible, with the provisions of the constitution, we shall proceed directly to the examination of the view of this case which the defendant has presented to our consideration, without stopping to inquire what construction of the repealing act, might be warranted by the natural import of the language used.

The constitution declares that "retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made either for the decision of civil causes or the punishment of offenses." And we shall in the first place examine whether the repealing clause in the statute we are now

considering, having the operation for which the plaintiff contends, must be considered as a retrospective law for the decision of a cause. In the case of *Woart v. Winnick*, 3 N. H. 473 [14 Am. Dec. 384], we remarked that "a law for the decision of a cause is a law prescribing the rules by which it is to be decided, a law enacting the general principles by which the decision is to be governed. And a retrospective law for the decision of civil causes is a law prescribing the rules by which existing causes are to be decided upon facts existing previously to making of the law. Indeed, instead of being rules for the decision of future causes, as all laws are in their very essence, retrospective laws, for the decision of civil causes, are in their nature judicial determinations of the rules by which existing causes shall be settled upon existing facts." These remarks were made in relation to an action pending upon which the attempt was to make a statute operate retrospectively. But we imagine that no doubt can exist that a law acting retrospectively upon an existing cause of action, where no suit is pending, is as much to be deemed a retrospective law for the decision of a cause, and as much within the prohibition of this clause in the constitution, as a law establishing a new rule of decision for an existing action.

In the case of the *Society v. Wheeler*, 2 Gall. 139, Mr. Justice Story held that "upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." And he decided in that case that the third section of our statute of June 9, 1805, relating to improvements made by tenants in real actions upon the land, was, with respect to that cause, a retrospective law prohibited by the constitution, although the suit was not commenced until more than a year after that section in the statute became a law.

In the case now before us, it appears that a forfeiture was incurred by the plaintiff, and a right to recover the forfeiture for certain purposes vested in the defendant. And it seems to us much too clear to need any further elucidation, that a law divesting the defendant of this right must be deemed a retrospective law for the decision of a cause; because a law for the decision of a cause is nothing more than a law by which the rights of the parties to the cause are to be settled and determined. And whenever a law is made for the decision of an existing cause of action, it is in its nature retrospective.

The next inquiry then is, was the right of this defendant to the said forfeiture a civil cause within the meaning of the clause in the bill of rights, which we are now considering. As to this question, we think there can be no diversity of opinion. The word "civil" is used in this article of the bill of rights to denote causes in which private rights are involved, and to distinguish such cases from criminal causes, in which the public alone is concerned: 3 Bl. Com. 2. This is very apparent from the language used: "No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offenses." In addition to this, it seems to be well settled that an action of debt, or an information brought to recover a penalty, is a civil proceeding: 1 Gall. 179; 2 Bos. & P. 532, note; 6 Johns. 101.

The case of *Lewis v. Foster*, 1 N. H. 61, has not escaped our notice; but in that case it was taken for granted that the law in which the action was founded was repealed. The question, whether the law could be repealed with respect to that action consistently with this provision in the constitution, was neither raised nor considered, and we can not view it as a decision of the point. And we are of opinion that to hold that the repealing clause in the statute of July, 1819, had the effect to divest the defendant of his right to the forfeiture which the plaintiff had incurred, would be to give that clause the operation and effect of a retrospective law, for the decision of a civil cause against both the letter and the spirit of this clause in the bill of rights.

We therefore feel ourselves bound to consider the repeal as not intended to affect either the right to the forfeiture, or the remedy which had been provided to enforce the payment of it.

The result, of course, is, that the warrant of distress was legally issued in this cause by the defendant, and he is entitled to judgment.

BARNARD v. EDWARDS.

[4 NEW HAMPSHIRE, 107.]

DOWER is not within the statute of limitations.

WRIT of dower. Plea, the statute of limitations, that the right and title of the demandant, Mary, to dower in the premises, if any she had, accrued to her more than twenty years next before the demandants, or either of them, made any claim or demand of dower, and more than twenty years next before the commencement of this suit. Demurrer and joinder.

Edwards, for the tenant.

J. Parker, contra, cited *Moore v. Frost*, 3 N. H. 126; *Hogle v. Stuart*, 8 Johns. 104; *Shaw v. White*, 13 Id. 179; *Hildreth v. Thompson*, 16 Mass. 193.

By Court, RICHARDSON, C. J. We are of opinion that the statute of June 19, 1805, section 1, applies only to actions, entries and claims, founded on some previous seisin or possession of the lands, tenements, or hereditaments demanded, from which seisin or possession the time of limitation may be dated; and that dower is not within the statute. For we have decided that dower can not have a limitation dated from the seisin of the husband: *Moore v. Frost*, 3 N. H. 126.

And it is clear that a limitation of dower can not be dated from the seisin or possession of the demandant, because she can not have either until dower has been assigned to her. For these reasons we think that dower is not within the statute: Co. Lit. 115 a, note 149.

It is possible that there may be cases in which it would be proper to submit it to a jury to presume a release of a right of dower from a long delay to demand it under certain circumstances after the right was known to have accrued. But the plea in this case is no answer to the action, and must be adjudged insufficient.

TYLER v. STEVENS.

[4 NEW HAMPSHIRE, 116.]

NEW TRIAL.—Affidavits of jurors that they misapprehended the instructions given by the court, can not be received in support of a motion for a new trial.

WRIT of entry. Verdict for the tenants. In the course of the term, the demandants moved the court to grant a new trial on the ground that some of the jurors who tried the cause had misunderstood the directions given to the jury by the court, and they offered the affidavits of five jurors to prove the fact.

Holton and Woodbury, for the plaintiffs.

Upham, for the tenants.

By Court, RICHARDSON, C. J. We have attentively considered the motion which has been made in this case, and are clearly of opinion that the affidavits of the jurors can not be received, and that the motion must be overruled.

The better opinion is that when the jury is guilty of misconduct in finding their verdict, as when they agree to determine it by lot, the fact can not be proved by the testimony of the jurors: 4 Binn. 150 [*Cluggage v. Swan*, 5 Am. Dec. 400]; *Owen v. Warburton*, 4 Bos. & P. 326; *Dana v. Tucker*, 4 Johns. 487; *Smith v. Cheetham*, 3 Cow. 56;¹ *Grinnell v. Phillips*, 1 Mass. 530; *Vaise v. Delaval*, 1 T. R. 11. It has been thought to be singular indeed that almost the only evidence of which the case admits should be shut out, but considering the arts which might be used if a contrary rule were to prevail, it has been thought necessary to exclude such evidence. And it is well settled that jurors are not to be received to testify to the motives and inducements on which they may have joined in a verdict: *Bridge v. Eggleston*, 14 Mass. 245 [7 Am. Dec. 209]; 15 Johns. 317 [*Jackson v. Dickenson*, 8 Am. Dec. 236]. Nor can the affidavits of all the jurors be received to correct a mistake in the verdict. It is said to be better that an individual should suffer than that such a rule, which must be productive of infinite mischief, should be introduced: *Jackson v. Williamson*, 2 T. R. 281.

In *Coster v. Merest*, 3 Brod. & Bing. 272, where it was shown that handbills reflecting on the plaintiff's character had been distributed in court, and shown to the jury on the day of trial, the court would not receive from the jurors affidavits in contradiction, and granted a new trial, thinking it might be of pernicious consequence to receive such affidavits in any case.

If it were once settled that the affidavits of jurors could be received to prove that they had misunderstood the instruction given them by the court, and that such misunderstanding was a legal ground for granting a new trial, the consequences would be most mischievous. For a very little tampering with individual jurors after the trial would enable any party to procure such affidavits, and no verdict could be permitted to stand.

Judgment on the verdict.

GRAND JUROR'S TESTIMONY IMPEACHING INDICTMENT.—See *Low's case*, 16 Am. Dec. 271.

1. *Smith v. Cheetham*, 3 Oaines, 57.

ADAMS v. MORRISON.

[4 NEW HAMPSHIRE, 166.]

WHERE AN EXECUTOR AUTHORIZED TO SELL LAND, under a license of the probate court, in order to raise a specified sum, sells an entire tract for a greater sum, the sale is void.

WRIT of entry. The facts sufficiently appear from the opinion.

Porter, for the demandant.

Dickey, contra.

By COURT. This is a very plain case. Jackson, the executor, acting under a license from the judge of probate to raise eight hundred dollars, by a sale of real estate, and having raised three hundred and fifteen dollars and twenty-nine cents under and in pursuance of the license, sold and conveyed the demanded premises to the tenant for five hundred and thirty-one dollars and thirty-seven cents. This sum, with what had been before raised, exceeded the sum which he was authorized to raise, and the sale to the tenant was clearly not warranted by the license.

We hold it to be clear law, that when an executor or administrator, acting under a license from the judge of probate, authorizing him to raise a particular sum by the sale of real estate, sells and conveys an entire tract of land, for an entire sum of money exceeding in amount the sum he is authorized to raise, the whole sale is void. The reason of this is obvious. His doings are valid so far as he acts in pursuance of the license and no farther. When he goes beyond his authority, his acts are void. And as in such a case the act is entire, and there is no way to ascertain what portion of the land he had authority to convey, and what not, the whole conveyance is necessarily pronounced to be void.

When separate tracts of land are sold under a license for distinct prices, the law is otherwise. In such cases, the sale of some parcels may be legal and that of other parcels not so. These principles have been frequently recognized by courts, and are believed to be sound law: *Jenkins v. Keymis*, 1 Lev. 150; *S. C. Hardres*, 395; *Com. Dig. "Pojar,"* c. 6; *Rattle v. Popham*, 2 Stra. 992; *Batty v. Carswell*, 2 Johns. 48; *Whitlock's case*, 8 Co. 138.¹ It is clear, then, that nothing passed to the tenant by Jackson's deed.

It is unnecessary to consider whether Jackson had any authority, as executor, to take back the estate conveyed to Perry

1. 8 Coke, 69.

and Merrill by canceling the deed; or whether, if the estate had been revested in the heir by that arrangement, it could have had any effect upon the conveyance to this tenant; because we are clearly of opinion that a reconveyance merely for the purpose of enabling Jackson to sell again, could not make the title of the tenant valid.

Judgment on the verdict.

EMERSON v. MURRAY.

[4 NEW HAMPSHIRE, 171.]

AN INDORSEMENT UPON AN INSTRUMENT before its execution may be parcel of the obligation, but to have this effect it must be shown affirmatively to have been upon the instrument when executed.

Writ of entry. The demandant, the executor of John True, counted upon the seisin of this testator in fee and in mortgage of the premises in question. A nonsuit was directed, subject to the opinion of the court upon a case stated. John Murray, being seised of the premises in fee, conveyed them by deed to True in fee. On the back of the instrument was a defeasance, providing that the same should be void upon the payment of a sum certain to True, his heirs or assigns. This writing was not signed, but appeared to be in the handwriting of True. It did not appear that the indorsement was upon the deed when it was executed. The question was, whether the instrument could be considered as a mortgage.

Sullivan and Mason, for the demandant.

Thom and Bell, contra.

By Court, RICHARDSON, C. J. An indorsement made upon an instrument before it is executed may be parcel of the obligation. It was very anciently so decided. In the case of *Brooke v. Smith*, Moor, 679, the action was debt upon an obligation the condition of which was to save certain lands harmless from all incumbrances made by the obligor, and upon the back there was a memorandum written, that the condition should not extend to an extent of a statute acknowledged by the obligor to a certain person. And because the extent was prosecuted, the obligee brought debt against the executor of the obligor, who pleaded the condition and the memorandum; and the question was, whether the memorandum was parcel of the condition added as an exception. The court held the memorandum to

be parcel of the condition, because it was "an explanation in writing of the intent of the parties written before the sealing of the obligation." The same principle has been often recognized in more modern times: *Steadman v. Purchase*, 6 T. R. 737; *Burgh v. Preston*, 8 Id. 483; *Lyburn v. Warrington*, 1 Stark. N. P. R. 162; *Weeks v. Maillardet*, 16 East, 568; *Cook v. Remington*, 6 Mod. 427; *Jones v. Fales*, 4 Mass. 245.

But we are of opinion that the indorsement in this case, which is found upon the deed, can not be considered as parcel of the deed until it is shown affirmatively to have been upon the instrument when executed. As this was not shown at the trial, the deed must be considered as a conveyance of the land absolutely, and the demandant can not, as executor, maintain this action.

Judgment on the nonsuit.

HAMILTON v. ELLIOT.

[4 NEW HAMPSHIRE, 182.]

ASSIGNEE BOUND BY ESTOPPEL.—Where the tenant in a writ of entry disclaims title to a portion of the demanded premises, both he and his assignees are estopped to subsequently set up against the demandant, or his assignees, any claim which the tenant may have had at the time of the disclaimer.

THE ESTOPPEL IS NOT SET AT LARGE by a subsequent agreement of the demandant to purchase all the tenant's right, title and interest.

WRIT of entry. The demandant was assignee of Samuel Hamilton and Bemiss, junior, grantees of Bemiss, senior. At the time of the grant the land was mortgaged to Abel Blake. The tenant was the assignee of Elliot and Appleton, who had, subsequent to the grant to Hamilton and Bemiss, levied their execution on two parcels of the tract conveyed, under a judgment recovered against Bemiss, sen., and had entered upon the land. They then took an assignment of Blake's mortgage. Hamilton and Bemiss, jun., commenced their action against Elliot and Appleton to recover the whole tract, when the latter filed their disclaimer as to the parcel on which execution had not been levied, which parcel was the subject-matter of the present proceeding. On the general issue pleaded in regard to the other parcels, Elliot and Appleton recovered.

Prior to the trial of this issue in the former proceeding, an agreement was entered into between the demandant in this proceeding, to whom Samuel Hamilton had conveyed, and Bemiss,

jun., of the one part, and Elliot and Appleton of the other, by which the former agreed to purchase and the latter agreed to sell all their right, title and interest, both at law and in equity to the whole of the premises mortgaged to Blake.

Woodbury, for the tenant, contended that the disclaimer was no estoppel, as Elliot and Appleton held the land as assignees of the mortgagee, and the mortgagor must be considered the owner of the estate: 13 Mass. 229; 15 Id. 280; 17 Id. 299; 1 Pick. 89; *New London v. Sutton*, 2 N. H. 401; Com. Dig., "Disclaimer," and "Droit," F.; 1 Cowen, 613. That in any event the subsequent agreement to purchase the title of the tenants, set the estoppel at large: *Bennet v. Irvin*, 3 Johns. 363.

J. Parker, contra.

By Court, RICHARDSON, C. J. This is a very plain case. In 1815, Samuel Hamilton and Benjamin Bemiss, junior, having all the title to the demanded premises under Benjamin Bemiss, senior, the mortgagor, which this demandant now has, as their assignee, brought a writ of entry against Elliot and Appleton, who then had all the title under the mortgagee which this tenant now has, and Elliot and Appleton disclaimed. The contest was then what it is now, if any contest could exist in the case, a contest between the assignee of the mortgagor and the assignees of the mortgagee. It is most unquestionable that this tenant can not now set up any title under the mortgagee against his disclaimer: *Stearns on Real Actions*, 222.

But it is said the agreement of this demandant to purchase all the right of Elliot and Appleton sets the estoppel at large. But the law is not so. The rule is, that where the deed refers to a generality, the party may aver that the matter to which the deed refers does not exist. Thus where the condition of an obligation was to pay all legacies which J. S. had devised by his will, the obligor is not estopped to say that J. S. gave no legacy by his will: 3 N. H. 209 [*Carpenter v. Thompson*, 14 Am. Dec. 348]; Moor, 420. And we are of opinion that the agreement of this demandant to purchase all the right of Elliot and Appleton can not estop him to say that they had no right, and there must be judgment for the demandant.

ESTOPPEL FROM DISCLAIMER.—The supreme court of Pennsylvania, in *Greeley v. Thomas*, 56 Pa. St. 35, had occasion to consider the effect of a disclaimer of title to a portion of the premises demanded in an action of ejectment. Judge Agnew, delivering the opinion, says: "It was a written confession of record to avoid further costs in the prosecution of the suit against

him [the defendant]. As to that part of the land which he disclaimed, it operates as an estoppel by record in this suit, unless withdrawn or amended by leave of the court."

ONE WHO CAUSES EXECUTION TO BE LEVIED on his own property by reason of his declaration that it belongs to the judgment-debtor, will be estopped to set up his title thereto: *Wells v. Higgins*, 13 Am. Dec. 235.

Where one in ignorance of his title, and without any intent to deceive, and in the absence of gross negligence, disclaims title to tract of land, whereby another, relying upon such disclaimer, purchases the land, such disclaimant will not be estopped from setting up his subsequently discovered title: *Davis v. Davis*, 26 Cal. 23. In regard to the effect of ignorance upon an estoppel, see the note to *Storrs v. Barker*, 10 Am. Dec. 316. One who has disclaimed title may withdraw the disclaimer and assert his title, so long as no one is injured thereby: *Frith v. Siler*, 23 Ga. 665. A woman's coverture is no bar to the operation of the estoppel arising from her disclaimer, under oath, of title to chattels: *Cooley v. Steele*, 2 Head, 605.

FARRAR v. FARRAR.

[4 NEW HAMPSHIRE, 191.]

THE CANCELING OF A DEED does not re-vest property which has once passed by transmutation of possession.

IDEM.—But where the grantee voluntarily, and without any misapprehension or mistake, consented to the destruction of the deed, with a view to re-vest the title, neither he, nor any other person claiming by title subsequently derived from him, is to be permitted to show the contents of the deed so destroyed.

AN AGREEMENT TO CANCEL A DEED, without actually canceling, is without effect.

COVENANT. Plaintiff declared on the breach of the covenant of seisin in a deed to him from the defendant, and dated in 1822; alleging as a breach that at the time of the conveyance, the latter had conveyed an undivided half to one Pierce. It appeared, that prior to the plaintiff's conveyance, the defendant had executed a conveyance of an undivided half to Pierce; and that Pierce had reconveyed the same in mortgage to the defendant. It did not distinctly appear whether the defendant was in possession when he conveyed to the plaintiff or not. Evidence was introduced, showing that prior to the conveyance to the plaintiff, Pierce had told the defendant that he would not be able to pay the purchase-money for the land, and wished to have the bargain given up, and that they verbally agreed to give it up. After Pierce's death, which was before the deed to the plaintiff, the mortgage, and the notes for which it was given, were found among Pierce's papers, the notes being canceled. The mort-

gage was obtained from the widow, and put on record in 1826. It did not appear that the deed from defendant to Pierce was redelivered or canceled. Verdict for the defendant, subject to the opinion of the court.

Wilson, jun., and J. Parker, for the defendant. The mortgage was never canceled; even if it were canceled, that fact would not operate to revest the title: *Botsford v. Morehouse*, 4 Conn. 550; *Gilbert v. Bulkley*, 5 Id. 262 [13 Am. Dec. 57]; *Marshall v. Fisk*, 6 Mass. 24 [4 Am. Dec. 76]; *Jackson v. Chase*, 2 Johns. 84; *Bolton v. Bishop of Carlisle*, 2 H. Bl. 264; *Nelthorpe v. Dorrington*, 2 Lev. 113.

Upham and Newton, contra.

By Court, RICHARDSON, C. J. It is well settled that the canceling of a deed does not revest property which has once passed under it by transmutation of possession: *Jackson v. Chase*, 2 Johns. 84; *Marshall v. Fisk*, 6 Mass. 24 [4 Am. Dec. 76]; 4 Barn. & Ad. 672; *Doe v. Bingham*, 4 Barn. & Ald. 672; 3 T. R. 156; 2 H. Bl. 263; *Woodward v. Aston*, 1 Vent. 296; *Boe v. Archbishop of York*, 6 East. 86; *Nelthorpe v. Dorrington*, 2 Lev. 113; *Shep. Touch.* 69, 70. And in all cases a mere agreement to cancel a deed without actually canceling it is without effect. Thus Shepherd in his Touchstone, 70, says: "If an obligee deliver up an obligation to be canceled, and the obligor do not afterwards cancel it, but the obligee happen to get it again into his hands and sue the obligor upon it, the obligor hath not any plea to avoid it, for the deed remains still in force."

So, in *Dana v. Newhall*, 13 Mass. 498, it was held that an agreement to cancel a deed, by which real estate had passed, did not revest the estate. In *Cross v. Powell*, Cro. Eliz. 483, it was held that "if a deed be delivered to be canceled to the party himself, yet if it be not canceled and the other gets it again, it remains a good deed." There are, however, cases in which an actual canceling of a deed by which land has passed, will, in effect, revest the estate. Thus, where A., being seised and possessed of lands purchased by him of B., by a deed only executed but not recorded, contracted to sell the land to C., and for that purpose canceled B.'s deed, who, at A.'s request, made a new conveyance to C., it was holden that C.'s title was valid, notwithstanding A. continued in the occupation of the land jointly with C. after the last conveyance: *Commonwealth v. Dudley*, 10 Mass. 408. So, in *Tomson v. Ward*, 1 N. H. 9, it

1. Can not be found.

was held that an unrecorded deed of land, voluntarily given up and canceled by the parties to it with intent to revest the estate in the grantor as between them and as to all subsequent claimants under them, operates as a reconveyance, and reverts the estate in the grantor.

It is apprehended that in these cases the canceling of the deed operates like a reconveyance, but that it is not in fact to be considered as such. The true ground on which these decisions are to be supported is, that the grantee, having voluntarily and without any misapprehension or mistake, consented to the destruction of the deed with a view to revest the title, neither he nor any other person claiming by a title subsequently derived from him, is to be permitted to show the contents of the deed so destroyed, by parol evidence. So that, in fact, there being no competent evidence that the land ever passed, the title is to be considered as having always remained in the grantor.

Such being the law, the case now before us is easily settled. The deed from the defendant to Pierce not having been actually canceled, remains in full force. The same is true of the mortgage from Pierce to the defendant. The notes given by Pierce for the land, and secured by the mortgage, having been given up and canceled under a misapprehension that the title to the land was revested absolutely in the defendant, they still remain due. It is, then, very clear that the defendant was seised of the land at the time he conveyed to the plaintiff.

The right of Pierce's heirs to redeem may be an incumbrance, for which the plaintiff may have a remedy, if his deed contained a proper covenant for that purpose, whenever he shall have extinguished that right. But in this case we are of opinion that there must be

Judgment on the verdict.

CANCELING DEED DOES NOT REVEST TITLE: *Gilbert v. Bulley*, 13 Am. Dec. 57.

SPENCER v. BLAISDELL.

[4 NEW HAMPSHIRE, 198.]

BANK BILLS MAY BE ATTACHED and sold under execution.

ASSUMPSIT. It appeared that the plaintiff, having been arrested on the charge of forgery, was searched and seventy dollars in bank bills found on his person. The defendant, a deputy

sheriff, took the same, promising to return them if the plaintiff was acquitted. He was acquitted, but the surrender of the bills refused on the ground that they had been attached in the defendant's hands at the suit of creditors of the plaintiff's father, who had absconded. It further appeared that prior to the father's going away he had told the plaintiff, a minor, to sell a yoke of oxen, to support the children until the father's return, and that he, the plaintiff, might keep the residue. Verdict for the defendant, subject to the opinion of the court.

Sheafe, for the plaintiff.

Bell, *contra*.

By COURT. If this plaintiff must be considered as the mere servant of his father in the sale of the cattle, it is very questionable whether this action can be supported: 1 Chit. Pl. 5; 1 N. H. 292; 1 H. Bl. 84. But we are inclined to think that the case shows a sufficient interest in the plaintiff to enable him to maintain the action. Whatever remained after the children were supported until the father should send for them was given to the plaintiff, who had not only the possession of the money, but an interest in it. And it seems to us that the plaintiff is entitled to recover, unless the defense which is interposed shall be found to be a good answer to the action.

This defense is, that the bills which the defendant took from the plaintiff have, since he received them, and before the commencement of this action, been attached as the property of Benjamin Spencer, the father. We entertain no doubt that between this plaintiff and the creditors of Benjamin Spencer, the property in these must be considered in Benjamin Spencer, the father. The money was raised by a sale of his property, and was to be applied to the support of his family. The plaintiff was an agent of his father, and the gift of the surplus to the plaintiff by his father was as against creditors altogether void: *Everett v. Read*, 3 N. H. 55.

It only remains to inquire whether bank bills can be legally attached. It is well settled that mere choses in action are not capable of being seized and sold on execution: *The Maine Fire and M. Insurance Co. v. Weeks*, 7 Mass. 438; *Denton v. Livingston*, 9 Johns. 96; *Ingalls v. Lord*, 1 Cow. 240; *Bogert v. Perry*, 17 Johns. 351 [8 Am. Dec. 411]; 4 Johns. 41; *Perry v. Coates*, 9 Mass. 537. And it has been made a question whether money could be seized upon execution: *Knight v. Briddle*, 9 East, 48;

1. *Knight v. Briddle*, 9 East, 48.

Fieldhouse v. Croft, 4 Id. 510; *Knowlton v. Bartlett*, 1 Pick. 271.

But the better opinion seems to be that money may be seized upon an execution: 1 Cranch, 133; 12 Johns. 220; 5 Id. 167; *Holmes v. Nuncoster*, 12 Id. 395.¹ And bank bills are treated as money: *Handy v. Dobbin*, 12 Johns. 220; 12 Id. 395; 1 Bun. 457; *Wright v. Reed*, 3 T. R. 554; *Warren v. Mains*, 7 Johns. 476; *Pickard v. Bankes*, 13 East, 20; *Saunders v. Graham*, 1 Niel Gow, 121.

It is very clear that whatever may be seized and sold on execution may be attached, and we are of opinion that there must be

Judgment on the verdict.

GRAFTON BANK v. KENT.

[4 NEW HAMPSHIRE, 221.]

ONE WHO SIGNS A PROMISSORY NOTE AS SURETY, although it does not so appear from the face of the paper, may establish the fact by parol evidence, as against one having notice; but such surety will be treated as a principal with respect to those who have no notice of his real character.

ASSUMPSIT upon the following promissory note:

“Oxford, July 1, 1823.

“For value received, we jointly and severally promise the president, directors and company of the Grafton Bank, to pay them or order five hundred dollars on demand, with interest after sixty days.

“AARON HALE.

“THOMAS KENT.”

The defendant, Kent, offered to prove that he signed as surety merely, and had been released by time given to Hale. To make out his defense, he released Hale, and called him as a witness. To the admission of the evidence the plaintiffs objected. The objection was sustained, and a verdict taken for the plaintiffs, subject to the court's opinion.

Bell, for the plaintiff.

Woodbury, contra.

By Court, RICHARDSON, C. J. It has been doubted whether, in an action of debt upon a bond in which the obligors are bound jointly and severally, a court of law could decide upon

1. *Holmes v. Nuncaster*, 12 Johns. 395.

an averment that one of the obligors put his seal to the instrument as a surety, when it did not appear to be true on the face of the bond: *Hunt v. The United States*, 1 Gall. 32; 2 Ves. jun. 540; 7 Johns. 337.

In many of the cases, where the rights and liabilities of sureties have been discussed, they have appeared as sureties upon the face of the instrument. In some instances, it has been expressly stated that they were sureties. In other cases, it has appeared by the nature of the contract: *The Commissioners v. Ross*, 3 Binn. 520 [5 Am. Dec. 383]; *Davey v. Prendergrass*, 5 B. & A. 187; *Wright v. Russel*, 3 Will. 530; 2 Pick. 223; 1 T. R. 291, note; 9 Mass. 267; 2 Cai. Cas. 57; 2 Saund. 411; 1 T. R. 287; 3 East, 484; 4 Bos. & P. 34; 5 Id. 174; 7 Johns. 332; 1 Bos. & P. 419; 10 East, 34; 3 N. H. 231; 15 Johns. 433; 5 B. & A. 187; 6 Taun. 379; 10 Johns. 587; 17 Id. 384; 1 Taun. 159; 2 Bos. & P. 61; 15 East, 617; 3 Bos. & P. 363; 5 Taun. 319; 4 Id. 456; *Samuell v. Howarth*, 3 Meriv. 272. In the case of *Orme v. Young*, 1 Holt, 84, the defendant pleaded that he entered into the bond as a surety; but it does not appear whether it was apparent on the face of the instrument that he was a surety. The same remark is applicable to the case of *Pain v. Packard*, 13 Johns. 174 [7 Am. Dec. 369].

In the case of *Townsend v. Riddle*, 2 N. H. 448, the character of the surety was not disclosed on the face of the contract; but the question whether it was competent to Riddle to show that he was in fact a surety, was not settled in that case. The case of *Stratton v. Rastal*, 2 T. R. 366, was assumpsit brought to recover back money which had been paid for an annuity bond made by Rastal and one Avarne, and which had become void. It appeared that Rastal and Avarne gave a joint receipt for the money, but Rastal showed that he was only a surety and received no part of the money, and was held not to be liable. But in that case the bond was void.

The case of *Wells v. Girling*, 8 Taun. 737, is more directly in point. To support a money count, the plaintiff offered in evidence a note of which the defendant was one of the makers. The defendant showed that there had been no antecedent dealings between him and the plaintiff, and that he signed the note as a surety only, and this was held to be a good answer to the action. If in such a case it was competent to the defendant to show that he was only a surety, it is difficult to imagine any good reason why a defendant should not be permitted to do the same thing when material where the count was upon the

note itself. If it was competent to the defendant there to say, "I am only a surety, and if you recover the money of me at all, you must recover upon the contract I made;" it must be very strange if in this case the defendant is not at liberty to say, "I am a surety, and you have so conducted towards me that I am by law discharged."

And we are on the whole of opinion that the rule is, where a maker of a note, who has signed as a surety, does not appear on the face of the paper to be a surety, he is to be considered and treated as a principal with respect to all those who have no notice of his real character; but that wherever it is material, a defendant may show by extrinsic evidence that he made the note as a surety only, and that it was known to the plaintiff that he was only a surety.

Verdict set aside, and a verdict entered for the defendant and judgment.

WHEN APPARENT PRINCIPAL MAY SHOW HIMSELF TO BE A SURETY.--As against a creditor having notice of the true relation of the parties, one apparently a principal in a written obligation may show, by parol, that he is but a surety, and he will be entitled to the privileges of that character. This question has often arisen in cases similar to the principal one, where two or more have signed their names to a promissory note. The weight of authority is to permit the one in fact a surety, and known so to be, to set up the fact in defense, where the holder has so treated with the other maker as to entitle the surety to be released. This defense is available at law as well as in equity, and may be supported by parol testimony. It may be invoked where the creditor, without the surety's consent, has given an extension of time to the principal, has released any rights against him to which the surety would have been subrogated, or has omitted to sue him upon a request by the surety so to do: *Mariners' Bank v. Abbott*, 28 Me. 280; *Lime Rock Bank v. Mallett*, 34 Id. 547; S. C., 42 Id. 349; *Cummings v. Little*, 45 Id. 183; *Higdon v. Bailey*, 26 Ga. 426; *McCarter v. Turner*, 49 Id. 309; *Stewart v. Parker*, 55 Id. 656; *Fraser v. McConnell*, 23 Id. 368; *Kelly v. Gillespie*, 12 Iowa, 55; *Coriell v. Allen*, 13 Id. 289; *Bruce v. Edwards*, 1 Stew. (Ala.) 11; *Bank at Mobile v. James*, 9 Ala. 949; *Murray v. Graham*, 29 Iowa, 520; *Flynn v. Mudd*, 27 Id. 323; *Kennedy v. Evans*, 31 Id. 258; *Rogers v. School Trustees*, 46 Id. 428; *Jones v. Fleming*, 15 La. Ann. 522; *Coats v. Swindle*, 55 Mo. 31; *Mechanics' Bank v. Wright*, 53 Mo. 153; *Bank of St. Albans v. Smith*, 30 Vt. 148. But there are courts which maintain that the fact of suretyship can not thus be shown by parol: *Shriver v. Lovejoy*, 32 Cal. 574; *Bull v. Allen*, 19 Conn. 101; *Hendrickson v. Hutchinson*, 29 N. J. L. (5 Dutcher) 180. And others which do not permit this defense of suretyship to be made at law: *Kerr v. Baker*, Walker, 140; *Farrington v. Gallaway*, 10 Ohio, 543. The supreme court of Texas has decided, in *Stroop v. McKenzie*, 38 Tex. 132, that neither party to a note can escape liability as principal, without alleging and proving that the payee or holder thereof had full knowledge of the fact that he signed the same as security, and not as principal; and that the payee or holder consented to take the note, holding him as security only.

The supreme court of New York, in *Hubbard v. Gurney*, 64 N. Y. 457, in an elaborate opinion considered this question, taking notice of the reasons urged by those cases which do not recognize the generally prevailing rule of the admissibility of parol evidence to show one to be a surety who signed as a principal, as against one having notice of that fact. The action was on a promissory note in form, "I promise to pay," and signed by two persons. The defendant alleged that he signed as surety. The opinion was delivered by Chief Justice Church: "The first question presented is, whether it is competent for one of two makers of a promissory note to prove by parol that he signed the note as surety, for the purpose of enabling him to interpose a defense, that he was discharged by an extension of time given to the principal debtor with knowledge of the suretyship. Recently in the supreme court it has been expressly decided in *Campbell v. Tate*, 7 Lans. 370, that such evidence was incompetent, and this was followed in *Benjamin v. Arnold*, 5 T. & C. 54.

"The question is of great practical importance and frequently arises, and there should be no delay in having a final adjudication upon it by this court. The ground of the objection is that such evidence tends to vary the terms or legal effect of the written instrument. It must be confessed that there is some confusion in the authorities upon the subject, but an examination of them shows that it is caused by doubts entertained by some of the courts in England and in this country, first whether a defense of this character could be set up in a court of law, and when that point was yielded, whether parol evidence of suretyship was competent in a court of law for the purpose of establishing the defense. These points troubled the courts in this state at an early day. In *The People v. Jansen*, 7 Johns. 331, the fact of suretyship appeared and was admitted, and the court, while adjudging that the rule for discharging a surety was the same at law as in equity, queried whether the fact of suretyship could be proved in a court of law. But in *King v. Baldwin*, 17 Johns. 384, Spencer, C. J., in dissenting from the opinion of Lord Loughborough, in *Rees v. Berrington*, 2 Ves. jun. 542, that when the form of the security bound the principal and surety, jointly and severally, the security could not aver that he is only bound as surety, except in equity, said: 'Now we could not assent to his lordship's proposition, that the fact of a man's being bound as security could not be averred at law if it becomes material to a legal inquiry, for we understand the rules of evidence to be the same in both courts.' At a later day in *Artcher v. Douglass*, 5 Denio, 509, Beardsley, J., while unable to find in the decisions any valid reason for not receiving the evidence at law, as well as in equity, hesitated in deciding that there was no reason. He said: 'The fact when ascertained, if sufficient in equity, is equally valid as a legal defense. The doubt is as to the reception of parol evidence to prove the fact in a court of law.' So in New Jersey, in *Pintard v. Davis*, 1 Zab. 632, there were two opinions; one maintaining that such evidence could not be admitted in a court of law, and the other expressed doubts whether it might not, but maintained that the facts alleged in that case did not constitute a defense either at law or in equity.

"There never has been any dispute that such evidence was admissible in a court of equity: 3 Paige, 614; 12 N. Y. 465; 2 Am. Lead. Cas. (5 ed.) 443, 456. Under the code, section 150, equitable defenses are permitted in actions at law, and this would seem to obviate the difficulty supposed previously to exist, both in setting up the defense and in receiving any evidence, which in a court of equity is admissible to sustain it. This was so held in England, where the admissibility of such evidence in a court of law has been regarded,

at times, with disfavor, in the case of *Greenough v. McClelland*, 105 E. C. L. 428, under a statute authorizing equitable defenses in actions at law: 7 El. & Bl. 431. Whatever might have been the distinction between such evidence at law and in equity, under the old system (and I have examined in vain to find any good reason for the distinction), there can be none in courts of both legal and equitable cognizance, and in respect to evidence to sustain a defense expressly permitted in actions at law. The general rules of evidence are the same at law as in equity; and it is no more competent to vary the terms of a written instrument by parol evidence in equitable actions, than in those strictly legal, unless in exceptional cases, for the purpose of maintaining an action or defense under some recognized head of equitable jurisdiction.

"The confusion and apparent conflict in the authorities must, I think, have originated in the idea that defenses of this character were equitable in their nature, and could only be available in a court of equity. When it was conceded that they were equally available in a court of law, it is difficult to find a reason for excluding the same evidence at law that is admissible in equity. However this may be, and without invoking any equitable rule, a conclusive answer to the objection to this evidence in any court, in my opinion is, that it does not tend to alter or vary either the terms or legal effect of the written instrument. The contract was in all respects the same, whether the defendant was principal or surety. In either case, it was an absolute promise to pay one thousand dollars, one day after date, nothing more and nothing less. There is neither condition nor contingency. It would have been precisely the same contract if the defendant had added the word 'surety' to his name. The addition of that word would not have varied it in the slightest degree. The only service it would have performed would have been to give notice to the other party of the fact. If this is shown *aliunde*, it is equally effective. There is nothing inconsistent in the instrument with the fact that the defendant signed as surety, as in 10 Peters, 263, where the sureties bound themselves in terms as principals. The fact is collateral to the contract, proving simply the relation of the parties. It is an extrinsic circumstance, not affecting the contract made, but which operates when knowledge of it is brought home to the creditor, to prevent him from changing the contract or making a different one with the principal debtor, without the consent of the surety, or from releasing any security held for the payment of the debt, and imposes the duty of enforcing the contract when due, upon request of the surety. The right to do these acts, or omit to perform such duty, in no legal sense, belongs to or is included within the terms or legal effect of the contract.

"The prohibition results from the relation of the parties. Nor is there any hardship upon the creditor in this rule. If the word 'surety' had been added to the name of the defendant, it is conceded that the defense sought to be interposed would be available in any court; and yet that word, as we have seen, would not affect the contract. The fact proved by extrinsic evidence, and that the creditor had knowledge of it, is as potent as if added to the name of the surety; and it is potent, not in varying the contract, but in imposing certain duties and obligations upon the creditor in his subsequent dealings with the principal debtor in respect to the contract. These views appear to me to be palpably correct upon general principles, and they are sustained by a decided weight of authority, and, if the distinction between the different courts is ignored, as I think it should be, by a uniform current of authority." In the exhaustive note of the editors of 2 Am. Lead. Cases, 441, *et seq.* (5 ed.), and in Brandt on Suretyship, sec. 17, *et seq.*, similar conclusions are reached.

The same principles have been also applied to instruments under seal. One of the makers of a joint note under seal: *Rogers v. School Trustees*, 46 Ill. 428; and of a joint and several note under seal, *Fowler v. Alexander*, 1 Heiskell, 425; one of two obligors in a joint and several bond: *Creigh v. Hedrick*, 5 W. Va. 140; and one of two lessees in a lease sued in debt for holding over: *Kennebec Bank v. Turner*, 2 Greenl. 42, were each permitted to show, by parol, the actual capacity in which he became a party to the obligation.

As the rule is established to prevent a creditor from taking advantage of the position of the surety by ignoring a relation known to exist, it is not necessary that the creditor should have knowledge of the true character of the surety at the time the obligation was executed. It will be sufficient if he have such knowledge when he committed the act which the surety complains of, as working his release: *Bank of Missouri v. Matson*, 26 Mo. 243; *Lauman v. Nichols*, 15 Iowa, 161; *Wheat v. Kendall*, 6 N. H. 504; *Smith v. Skelden*, 35 Mich. 42; *Pooley v. Harradine*, 7 Ell. & Bl. 431; *Wythes v. Labouchere*, 3 De G. & J. 593. Chief Justice Baldwin, in *Lauman v. Nichols*, 15 Iowa, 161, speaking of the application of the rule to an indorsee of a note, who did not have notice when he took it of the relationship of principal and surety between the makers, but who gave time to one of them after being informed thereof, stated: "The principle obtains for the protection of the sureties, and the holders of such notes, knowing their relation, should avoid any act endangering their rights; and we are unable to perceive the distinction as to when the knowledge of such relation was obtained, whether before or after the purchase, so that it was known before the extension was made." And according to *Cummings v. Little*, 45 Me. 183, notice to the creditor may be either express or implied.

The law upon this subject now prevailing in California is to be found in section 2832 of the Civil Code, which is as follows: "One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal."

MORSE v. SHATTUCK.

[4 NEW HAMPSHIRE, 229.]

A CONSIDERATION EXPRESSED IN A DEED can not be contradicted for the purpose of defeating the conveyance, except in cases of fraud.

IDEM.—To ASCERTAIN THE DAMAGES for the breach of the covenant of seisin in a deed, the true consideration may be shown by parol, notwithstanding a different consideration is expressed in the deed.

COVENANT broken. Verdict for the plaintiff. The question reserved was in regard to the measure of damages for the breach of the covenant of seisin in defendant's deed to the plaintiff, the consideration being expressed in the instrument as nine hundred dollars, but found by the jury to be in reality but one hundred dollars.

Goodall, for the defendant.

Bell, contra.

RICHARDSON, C. J. It seems to me to be well settled as a general rule that in a court of law when a consideration of money is expressed to have been paid in a deed made for the purpose of conveying land, the law will permit no averment to the contrary: *Fisher v. Smith*, Moor, 569; Shep. Touch. 223; Phillips Ev. 424. It has been held in some cases that if a particular consideration be expressed in a deed, no other consideration can be averred: *Clarkon v. Hanway*, 2 P. Wms. 203; *Schermerhorn v. Vanderheyden*, 1 Johns. 139 [3 Am. Dec. 304]; *Hawes v. Barker*, 3 Id. 506; 2 W. Bl. 1249; *Maigley v. Hauer*, 7 Johns. 341; 2 Co. 76. In other cases it has been held that any consideration not inconsistent with that expressed in the deed may be averred: Phil. Ev. 424, 426; *Mildway's case*, 1 Co. 175; *Bedell's case*, 7 Id. 133.¹ These authorities may be probably all reconciled by adverting to the different purpose for which an attempt has been made to show other considerations than those expressed in the deed, and to the different species of considerations which have been expressed in the deeds.

It is perfectly well settled that a consideration expressed in a deed can not be disproved for the purpose of defeating the conveyance, unless it be on the ground of fraud. Thus, where a consideration of money is expressed in a deed of bargain and sale, no averment is admissible that no money was paid, in order to show that nothing passed by the deed for want of a consideration of money: *Wilt v. Franklin*, 1 Binn. 502. But for other purposes the acknowledgment of the receipt of money in a deed may be contradicted. Thus, in *Kip v. Deniston*, 4 Johns. 23, it was decided that where two trustees for the sale of an estate joined in a conveyance, and both acknowledged the receipt of the consideration money, but the money went into the hands of one of the trustees, the other was not answerable for the money so received by his co-trustee, and misapplied.

In *Shephard v. Little*, 14 Johns. 210, it was decided that where the consideration of a conveyance was expressed in the deed and that it was paid, parol evidence was notwithstanding admissible to show that it was not paid. So in *Wilkinson v. Scott*, 17 Mass. 249, it was decided that an action lay for the grantor of land against the grantee for part of the consideration expressed in the deed to have been paid, which the defendant by mistake failed to secure or pay. And Parker, C. J., in that case, said: "A man is estopped by his deed to deny that he granted or that he had a good title to the estate conveyed, but

1. 7 Coke, 40.

he is not bound by the consideration expressed, because that is known to be arbitrary, and is frequently different from the real consideration of the bargain."

And we are of opinion in this case that although the receipt of the payment of the consideration expressed in a deed can not be contradicted for the purpose of defeating the conveyance, yet for the purpose of ascertaining the damages to which a plaintiff may be justly entitled for the breach of the covenant of seisin in a deed, the true consideration may be shown, notwithstanding a different consideration is expressed in the deed. The plaintiff is, therefore, entitled to judgment for one hundred dollars and interest.

HARRIS v. RAND.

[4 NEW HAMPSHIRE, 259.]

FOR TRANSPORTING GOODS TO AN INTERMEDIATE POINT, the carrier can not recover freightage, unless the goods were actually delivered and actually received.

ASSUMPSIT to recover for the transportation of one hundred and sixty-six and one half bushels of salt. Verdict for the plaintiff, subject to the opinion of the court upon the following facts: The defendant delivered to the plaintiff, at Hartford, Connecticut, a large quantity of salt, to be transported from that place to Haverhill, in this state, and there delivered to the defendant, at Kimball's Landing. When the plaintiff arrived at Sugar river, the defendant met him, and said that he was afraid that the plaintiff could not reach the landing, the river being frozen, and that he must go up as far as he could, and then land the salt in the most convenient place. When the plaintiff arrived at McDuffie's ferry, thirteen miles below the landing, the river was found to be so frozen that he could proceed no further in his boat. The salt was then placed on the shore under the care of two boatmen, and word sent to the defendant. That night the river was so obstructed with ice that the current changed its course, and swept away the one hundred and sixty-six and one half bushels of salt. The defendant accepted the salt remaining the next day, and paid the freightage for it. The question was, whether he also was liable for the freightage of the salt that was lost.

Goodall and Bell, for the plaintiff.

J. Smith, contra.

RICHARDSON, C. J. This is a very clear case. The contract between the parties was, that the plaintiff should transport the salt from Hartford to Haverhill. On this contract the plaintiff has no right of action, because it has not been performed on his part.

But it is contended that there was an agreement on the part of the defendant to receive the salt at any place where the plaintiff might be compelled to land it, and that as the plaintiff was compelled to land it at McDuffie's ferry, and did actually land it there, an implied promise arises to pay for the freight of all the salt to that place. In examining this ground on which the plaintiff rests his claim, we shall take it for granted that it was the understanding of the parties that the defendant should receive the salt at any place where the plaintiff might be compelled to land it, and proceed to inquire whether, if such were the understanding of the parties, the action can be maintained.

Where there is a special contract to carry goods from one port to another, if the owner accept his goods at an intermediate port, such acceptance is held to raise an implied promise to pay a *pro rata* freight: *Post v. Robertson*, 1 Johns. 24; *Cook v. Jennings*, 7 T. R. 381; *Liddard v. Lopes*, 10 East, 526; *Shields v. Davis*, 6 Taun. 75; *Scott v. Libbey*, 2 Johns. 336; *Mulloy v. Backer*, 5 East, 316; *Christy v. Row*, 1 Taun. 300; *Abbot on Shipping*, 335; *Luke v. Lyde*, 2 Burr. 882; *Roccas*, 71. The ground on which this rule rests is that the owner who receives the goods at an intermediate port has the benefit of the transportation to that place, and this benefit is the foundation of the implied promise. Besides, it is to be presumed that if the goods were not accepted at the intermediate port, the carrier would convey them to the destined port, and earn his whole freight. But an agreement to accept the goods at an intermediate port, is not for this purpose tantamount to an actual acceptance of the goods. To raise an implied promise to pay a *pro rata* freight, the goods must be actually delivered and actually received. Until this is done, the owner can not be considered as having received any benefit from the transportation.

In this case, Rand never received the salt. It was lost before it could be delivered to him. He has received no advantage from the labor of the plaintiff in transporting the salt which has been lost, and there is nothing on which to ground an implied promise to pay for that labor. If the defendant had ac-

tually received the salt, he would have been liable for the freight, although it might have been lost the next moment. The acceptance of the goods is the very substance of the implied contract. The defendant agreed to receive the goods at any place where the plaintiff might be compelled to stop. But the salt has never been received by the defendant at any place. The landing of the salt at McDuffie's ferry can not be considered as a delivery to the defendant. It still remained in the custody of the plaintiff until lost.

We are of opinion, that upon the case stated, the verdict can not be sustained, and, of course, there must be

A new trial granted.

AT THE MAY TERM, 1829, 4 N. H. 555, the case came before the court again, on the new trial, the additional fact being introduced, that the defendant agreed to accept the salt at any intermediate point where the plaintiff might be compelled to land it. A verdict was taken for the plaintiff by consent, subject to the opinion of the court, which was pronounced as follows:

"We have given an opinion in this case on a former occasion, and the only change in the statement of facts which a new trial has produced is, that it now appears the defendant agreed to receive the salt at any place where the plaintiff might be compelled to stop. Upon the case, as before stated, we are of opinion, that, as the plaintiff had agreed to convey the salt to Kimball's landing, he could not be entitled to freight by carrying it to any place below that landing, unless the defendant actually accepted it at a place below. And we think the law of the case is not changed by the new circumstance now introduced into the statement. A previous agreement to accept at a different place from that mentioned in the original contract, was not such an acceptance as entitled the plaintiff to freight. It changed the place of delivery, and made a delivery at another place equivalent to a delivery at Kimball's landing. It in fact made McDuffie's ferry the place of delivery. But it was not enough that the salt was carried to the place of delivery. The contract was, that the plaintiff should not only carry, but deliver. And he was not entitled to freight until the contract was performed on his part, by an actual delivery: *Abbot on Shipping*, 308; *Lane v. Penniman*, 4 Mass. 91. It is well settled, that a carrier is responsible for goods until they are actually delivered, and a mere landing of the goods is no delivery. The delivery of the goods is as much a part of his duty as the carriage: *Ostrander v. Brown*, 15 Johns. 39 [8 Am. Dec. 211]; *Golden v. Manning*, 3 Wils. 429; S. C., 2 W. Bl. 916; *Hyde v. Navigation Co. from T. to M.*, 5 T. R. 389; *Owen*, 57; 2 Esp. N. O. 693. Verdict set aside."

ROBY v. WEST.

[4 NEW HAMPSHIRE, 285.]

A STATUTE INFLECTING A PENALTY for the commission of an act, implies a prohibition.

THE REPEAL OF A STATUTE making an act illegal, does not thereby render the act valid.

WHERE PARTIES ARE IN PARI DELICTO with reference to an illegal contract, neither can maintain an action which requires, for its support, the aid of such illegal contract.

TROVER for three tickets in the grand state lottery in Rhode Island, one of which had drawn a prize of five hundred dollars. The defendants purchased the tickets with others, in Massachusetts, and delivered them to the plaintiff to sell on commission. The tickets in question remained in the plaintiff's possession unsold until after the drawing, when the defendants, having received a list of the successful prizes, obtained the tickets from the plaintiff. The plaintiff offered evidence to prove that at the time he received the tickets it was agreed that he should return the unsold tickets before the day of drawing, or be accountable for them; and that the defendants had refused, on that ground, to take the unsold tickets back after the drawing, before they heard of its result. The court instructed the jury, that if they believed that the defendants delivered the tickets to the plaintiff to sell for them, and to be accountable to them for those unsold and not returned before the day of drawing the lottery, the right and property in the tickets so unsold and not returned, became vested in the plaintiff, and that he was entitled to recover the value of them in this action. Verdict for the plaintiff. Motion for a new trial, on the ground that the jury were misdirected, because by the laws of this state, any sale of such tickets is prohibited and void.

M. Kent, for the defendants.

S. Fletcher, for the plaintiff.

By Court, RICHARDSON, C. J. It is contended in this case, on behalf of the defendants, that the plaintiff's title to the tickets, mentioned in his declaration, rests entirely on the contract of sale, made with him by the defendants, and that contract being contrary to law and void, the plaintiff has failed entirely to show any legal foundation for maintaining an action to recover the value of them.

We shall, in the first place, consider whether the contract of sale made between these parties was illegal. The statute of June 12, 1807, entitled "an act for the suppression of lotteries," sec. 3, enacts that if any person or persons shall offer or expose to sale, actually sell, or otherwise dispose of to any person in this state any lottery ticket, such person shall forfeit a sum not exceeding three hundred dollars, nor less than ten dollars, for each ticket so exposed to sale, or otherwise disposed of, etc.,

provided always, that nothing in this act shall be construed to extend to any lottery allowed, or that shall hereafter be allowed, by act or law of the legislature of this state or of the United States."

That this clause in the statute was intended to prohibit the sale of lottery tickets in this state except in the cases mentioned in the proviso, and that it rendered all sales of tickets not warranted by a law of this state, or of the United States, illegal, is much too clear to admit of a doubt. It is not necessary, to render a contract illegal, that it should be so expressly declared by statute. If a penalty be inflicted by statute, that implies a prohibition: *Mitchell v. Smith*, 1 Binn. 110 [2 Am. Dec. 417]; *Carthew*, 252. The statute of June 12, 1807, is now repealed by the statute of July 7, 1827. This circumstance can have, however, no influence upon the decision of this case. Because, in the first place, an act made by a statute illegal, is not made good by a subsequent repeal of the statute: *Jaques v. Withy*, 1 H. Bl. 65.

And because, in the next place, the repealing act having been passed since the commencement of this action, to construe it to take away any ground of defense which these defendants may have had under the repealed act, would give it the operation of a retrospective law for the decision of a civil cause which is prohibited by the constitution: *Woart v. Winnick*, 3 N. H. 473 [14 Am. Dec. 384].

We shall in the next place consider the effect of the illegality of the contract upon its validity. The statute of June 12, 1807, was copied from a statute upon the same subject passed on the fourteenth of February, 1791, with some variations in the amount of the penalties; and the last-mentioned statute was copied from the provincial act of the 27 Geo. II, c. 118, in the preamble of which it is recited that there has lately been set up within the province sundry lotteries, which have been, and, if tolerated, might be attended with many evil and pernicious consequences, not only to individuals, but also to the public, for remedy whereof the act purports to have been passed: *Prov. Laws*, 181.

In an act of the province of Massachusetts, passed in 1791, lotteries are denounced as mischievous and unlawful games, whereby children and other unwary people had been drawn into a vain and foolish expense of money, which tended to the utter ruin and impoverishment of many families, and was to the reproach of the government and against the common good,

trade, welfare and peace of the province, and they are declared to be common nuisances: Col. and Pro. Laws, 751. A statute of the state of New York, after reciting that experience has proved that private lotteries occasion idleness and dissipation, and have been productive of frauds and impositions, declares that every lottery, other than such as shall be authorized by the legislature, shall be deemed a common and public nuisance: 5 Johns. 333. From these preambles and enactments, it appears that the sale of tickets in lotteries has been usually prohibited by statute, not only on general grounds of public policy, but particularly for the protection of the unwary, who might otherwise be defrauded and injured by such sales.

It is also worthy of remark, that under our statute now in force, and under all which have preceded it, it is the vendor and not the purchaser of a ticket who incurs the forfeiture. It is the sale and not the purchase which is prohibited, and if nothing appeared in the contract between the parties, more than simply a sale of the tickets by the defendants to the plaintiff, we should be induced to pause before we permitted them to allege the illegality of their own act, for the purpose of enabling them to retain the proceeds of a fortunate ticket, after they had sold it to the plaintiff and induced him to take and actually run the risk of its proving an unfortunate number. In such a case the parties could not be viewed, perhaps, as *in pari delicto*, and although the vendor of a ticket might not be legally entitled to recover the price for which he might have sold it, in a court of justice, it is by no means clear that the purchaser might not be entitled to recover the value of the ticket in a suit against the vendor, when he had obtained possession of it by wrong: *Clarke v. Shee*, Cowp. 197; *Jaques v. Wilby*, 1 H. Bl. 65; Selw. N. P. 79; *Lowry v. Bourdieu*, Doug. 468; *Jaques v. Golightly*, 2 W. Bl. 1083.¹

But the contract between these parties was not a simple contract of sale. The defendants contracted to employ the plaintiff as their agent to sell the tickets upon commission, and he contracted to be thus employed. This is the body of the contract. One of the stipulations was, it is true, that the tickets which he did not sell, nor return to the defendants, previously to a certain time, should be considered as purchased by the plaintiff. But that stipulation was only part of an entire contract, the main object of which was directly contrary to the statute. The parties stand, then, *in pari delicto*, and in such a case the

1. 2 Wm. Bl. 1073.

illegality of the contract renders it void. This rule of law is founded in good sense and sound reason, and has been illustrated and applied in various adjudged cases, and is now as well settled and established as any principle of law can be: *Springfield Bank v. Merrick*, 14 Mass. 322; *Wheeler v. Russell*, 17 Id. 258; *Ex parte Bell*, 1 Mau. & Sel. 751; *Simpson v. Bloss*, 7 Taun. 246; *Hunt v. Knickerbocker*, 5 Johns. 327; *Mitchell v. Cockburne*, 2 H. Bl. 379; *Webb v. Brooke*, 3 Taun. 6; *Cannan v. Bryce*, 3 B. & A. 179; *Law v. Hadson*, 11 East, 199¹; *Aubert v. Maze*, 2 Bos. & P. 371.

The principle that no court shall aid men, who found their cause of action upon illegal acts, is not only a well settled, but a most salutary principle. It is fit and proper that those who make claims which rest upon violations of the law should have no right to be assisted by a court of justice. It is fit and proper that courts should refuse their aid to those who seek to obtain the fruits of an unlawful bargain. It is fit and proper, when parties come into court to litigate claims founded upon illegal contracts in relation to which they stand *in pari delicto*, that they should be viewed and treated in those transactions as outlaws, who have forfeited the protection of the law; and it is fit and proper that they should be left to adjust their unlawful concerns as they can, and enjoy the fruits of their transgressions of the law as they may.

We have considered the question, whether the parts of the contract may be separated, and the plaintiff permitted to recover on that part in which a sale to him is stipulated. But we find it settled that this can not be legally done. The plaintiff can not by law recover, unless he is legally entitled to recover upon the whole case: *Booth v. Hodgson*, 6 T. R. 405; *Card v. Hope*, 2 B. & C. 661; *Holland v. Hall*, 1 B. & A. 53. It only remains to consider what effect the illegality of the contract between the parties has upon the plaintiff's right to recover in this case. It has been settled that the test, whether a demand connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case: *Simpson v. Bloss*, 7 Taun. 246.

This rule is easily applied to the case now before us. It is stated that these defendants bought the tickets in Massachusetts. They were thus once the property of the defendants, and the plaintiff has shown no other title to them than what he derives from the illegal contract; and as he can not recover without

1. *Law v. Hodson*, 11 East, 306.

showing a title to the tickets, and no valid title can be founded on that contract, it is perfectly clear that upon the case stated, he is not entitled to maintain the action. By his own showing, he contracted to become a vendor of tickets, in open violation of the laws of this state; and although the defendants stand, in this respect, on no purer ground than he does, for they contracted with him to violate the law, yet, in relation to this action, they stand on very different ground. They are not actors; they seek no protection under the illegal contract; they rest no claim upon it.

It is the plaintiff who comes into court with this unlawful bargain, and who rests his whole cause upon it. It is he who seeks to draw justice from this impure fountain. It is his misfortune that he happens to be plaintiff in this case; but it is no more than justice to say that, according to the finding of the jury, the defendants do not seem to have any merit whatever on their side, except in the single circumstance that they are defendants.

What ought, in honor, to be done between these parties, is a question we are not called upon to decide. But neither sound policy, nor the laws of the land, can permit this action to be sustained.

Verdict set aside, and a new trial granted.

BARKER v. CLARK.

[4 NEW HAMPSHIRE, 390.]

RIGHT OF WAY, APPURTENANT.—Where the owner of three tracts of land, over one of which he has been accustomed to pass by a way between the other two, conveys these two, with their appurtenances, the way does not pass.

A HIGHWAY MAY BE ESTABLISHED BY LONG USAGE; but a way, to become public, must be used in such a manner as to show that the public accommodation requires it to be a highway, and that it is the intention of the owner of the land to dedicate the way to the public,

TO REBUT THE PRESUMPTION OF THE GRANT OF A WAY from an alleged uninterrupted use, evidence that the owner of the land had plowed up the way, within the statutory time, at the same time declaring that the claimant had no right of way, is admissible.

TRESPASS for breaking and entering the plaintiff's close. Pleas in bar, first, public way; second, private way through the *locus in quo*. In support of the first plea the defendant offered to prove that the people in the neighborhood and others had long been accustomed to pass through the close, on foot and in teams;

but as he did not offer to prove that a way had been ever opened, or made, or repaired as a highway, the evidence was rejected. In support of the second plea, it appeared that Moses Clark, being seised of three closes, over one of which a way had been commonly used in passing to and from the other two, conveyed these two closes, with their appurtenances, to the defendant, Levi Clark, who contended that the way passed by the conveyance, as appurtenant. The defendant also endeavored to prove an uninterrupted use of the way for more than twenty years; and to rebut this evidence the plaintiff proved that within twenty years, Moses Clark, being then the owner of the third close, had plowed up the way, declaring that Levi had no right of way there. It not appearing that this declaration was made in the presence of Levi, he objected to its admissibility. The objection was overruled, and a verdict returned for the plaintiff. Motion for a new trial.

Tilton and Mason, for the plaintiff.

Woodbury, contra.

By Court, RICHARDSON, C. J. One of the questions to be decided in this case is, whether the grant by Moses Clark, of two of his closes, with their appurtenances, passed a way through another close belonging to him and which had been used to pass from one of the granted closes to the other.

This question is believed to be well settled. There is no doubt that when one man has a right of way through the close of another, which right of way is appurtenant to his land, a grant of his land with its appurtenances will pass the right of way. But a man can not have right of way through his own land independent of his right to the land. Moses Clark may have had a way through the *locus in quo*. But his right to it was not an easement. There was no existing easement.

The question then is, whether by a grant of two lots with their appurtenances a new easement in a third lot can be created. It seems to be well settled that by the word appurtenances existing easements alone can pass: *Whalley v. Thompson*, 1 Bos. & P. 371; *Morris v. Edginton*, 3 Taun. 24; *Clements v. Lambert*, 1 Id. 206; *Buckley v. Coles*, 5 Id. 311; *Surrey v. Piggott*, Latch, 153; *Kooystra v. Lucas*, 5 B. & A. 830; *Bradshaw v. Eyre*, Cro. Eliz. 570; *Worledge v. Kingswel*, Id. 794; *Saundys v. Oliff*, Moor, 467. A way through the *locus in quo* might have been granted by the use of proper terms. Thus, if the two closes granted by Moses Clark had been granted with all ways commonly used

with them, a new right of way through the *locus in quo* might have been created and passed. But the word appurtenances is clearly not sufficient for this purpose. We are, therefore, of opinion that no right of way through the close in question, passed by Moses Clark's grant.

Another question in this case is, whether the evidence offered by the defendant was sufficient to show the existence of a highway through the *locus in quo*. We entertain no doubt that a highway may be proved by long usage; but a way to become public must be used in such a manner as to show that the public accommodation requires it to be a highway, and that it is the intention of the owner of the land to dedicate the way to the public: *Pritchard v. Atkinson*, 3 N. H. 335; *State v. Campton*, 2 Id. 513.

In this case, there was no evidence that the road was ever opened, or made or repaired. There was no attempt to offer any evidence which showed an intention in the owner of the land to dedicate the way to the public, or that public convenience required the way. And we are clearly of opinion, that the evidence was properly rejected as wholly insufficient to prove a highway.

One other question is, whether the declarations of Moses Clark, denying the right of way through the *locus in quo*, were, under the circumstances, admissible in evidence. To settle this question, it is only necessary to state the purpose for which this evidence was introduced. The defendant attempted to show an uninterrupted use of the way for more than twenty years. To meet this evidence, the plaintiff showed that the owner of the close had plowed up the way, denying the right of way. This evidence comes within the rule laid down in *Downs v. Lyman*, 3 N. H. 486, "that where it is necessary in the course of a cause to inquire into the nature of a particular act, and the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence, for the purpose of showing its true character."

The declarations of Moses Clark were admissible to show that his act was adverse to all claims of right on the part of others to the way.

WHAT PASSES AS APPURTENANT: See *Strickler v. Todd*, 13 Am. Dec. 642, and note.

PRITCHARD v. BROWN.

[4 NEW HAMPSHIRE, 397.]

A RESULTING TRUST may be shown by parol evidence.

CONSIDERATION EXPRESSED TO BE PAID by the grantee does not exclude evidence that the money belonged to a third person.

THE RECEIPT OF THE CONSIDERATION expressed in a deed may be contradicted like any other receipt; but not for the purpose of defeating the conveyance.

THE INTEREST OF A CESTUI QUE TRUST in lands may be taken in execution.

THE ACTUAL POSSESSION BY A BENEFICIARY of lands, is notice of the trust to a purchaser.

LAND WILL PASS BY WAY OF BARGAIN AND SALE, where a consideration of money is expressed in the deed, although defectively executed under the state statute.

WRIT of entry. Verdict for the tenant, and motion for a new trial. The facts were: James Sanderson, being seised of the premises in fee, conveyed the same to Thomas Felt by deed dated November 5, 1816. Felt, by deed dated March 31, 1820, conveyed the same to Samuel Lees, for a consideration expressed to be paid by Lees. Lees conveyed to the demandant in July, 1820. On the fifth of November, 1816, Felt reconveyed to Sanderson in mortgage; but afterwards, by agreement of the parties, Felt, by the deed of March 31, 1820, conveyed to Lees in trust for Sanderson, who immediately entered into possession, and occupied the same until 1825. In 1823, one Cook levied an execution on the land under a judgment against Sanderson, and soon after conveyed to the tenant, by a deed having the signature of but one witness. The court charged the jury in favor of the tenant.

G. F. Farley and Walker, for the demandant.

B. M. Farley, contra.

By Court, RICHARDSON, C. J. One of the questions which arises in this case is, whether, as the consideration money in the deed from Felt to Lees is expressed in that instrument to have been paid by Lees, it is competent to permit the tenant in this case to show, by parol evidence, that the consideration was in fact paid by James Sanderson. This question is the same with one of the questions decided in the case of *Scoby v. Blanchard*, 3 N. H. 170; but as there has been considerable diversity of opinion heretofore upon this question we have thought that a re-examination of it might not be without utility, and we shall now state the result of such further examination as we have been enabled to make of the question.

Those who hold that parol evidence is not admissible in such a case seem to rest their opinion on two grounds; in the first place they hold that the parol evidence is repugnant to the deed, and on that account inadmissible; and in the next place, that the statute of frauds and perjuries has rendered it inadmissible: Rob. on Frauds, 99, 100; *Kirk v. Webb*, Prec. Ch. 84; *Newton v. Preston*, Id. 103; *Gascoigne v. Thwing*, 1 Vern. 366;¹ *Cross v. Newton*, 2 Atk. 75;² 12 Mass. 109; Sanders on Uses, 112-113.

In the case of *Scoby v. Blanchard*, to which we have before alluded, the court were of opinion that the objection to parol evidence, introduced in such a case to show that the consideration money belonged to a third person, on the ground that it goes to contradict the deed, was not well founded in point of fact. We still retain the same opinion. The fact stated in the deed is that the consideration money was paid by the grantee. The parol evidence, proving that the money belonged to a third person, does not go to contradict the fact stated in the deed, but to repel a presumption arising from that fact. It is not the case of parol evidence introduced to contradict, vary, or control the settled legal construction of the instrument, like the evidence offered in *Barry v. Morse*, 3 N. H. 134. But the evidence is in this case introduced for a very different purpose. It is generally the case that when a man pays for land and takes a deed of it in his own name, the money he pays is his own; and in the ordinary course of things it is not likely to be often otherwise. On this ground rests the presumption that he by whom the consideration money is stated in a deed to have been paid, was the owner of the money, and the presumption has no other foundation.

It is never stated in the deed to whom the money paid belonged. Nor have the terms in which the payment is commonly expressed in the deed ever been construed necessarily to import that the money paid is the money of the person who is stated in the deed to have paid it. The ownership of the money is not a part of the contract to be deduced by construction from the terms of the instrument as a part of their legal import, but is merely presumed from a fact stated in the deed, which is of such a nature as to afford a reasonable ground from which to infer the ownership. It therefore seems to us to be exceedingly clear that parol evidence introduced in cases of this kind to show to whom the money belonged is not repugnant to the terms of

1. *Gascoigne v. Thwing*, 1 Vern. 366.

2. *Crop v. Newton*, 2 Atk. 75.

the deed, in such sense as to render it inadmissible on that ground.

But there is another answer to this objection to the evidence. Even if the evidence were repugnant to that clause in the deed, which states the payment, it would still be competent testimony. It was not introduced to defeat the operation of the conveyance, and it must now be considered as settled, in this state, that a receipt in a deed may, for any other purpose, be contradicted like any other receipt: *Morse v. Shattuck* [ante, 419]. For these reasons, it seems to us that the objection to the testimony introduced to show who was the owner of the consideration-money, on the ground that it went to contradict the deed, is without any legal foundation, and can not be sustained; but it has been supposed that such testimony has been rendered inadmissible by the statute of frauds and perjuries.

In order to understand this objection to the testimony, it is necessary to advert to the clause in the statute, which is supposed to have that effect. It is in the statute of February 10, 1791, entitled, "An act declaring the mode of conveyance by deed," sec. 2, and is as follows: "That all grants and assignments, and all declarations and creations of trusts, or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is, by law, enabled to declare such trust, or by his last will in writing, or else they shall be utterly void, and of none effect. Provided, always, that where any conveyance shall be made of any lands, tenements or hereditaments, by which a trust or confidence shall arise, or result by the implication or construction of law to be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect, as the same would have been if this act had not been made."

It may be here remarked, that these provisions are the same as those contained in the statutes which have been enacted upon the subject in England, Massachusetts and New York: Rob. on Frauds, 91; 3 Shep. Touch. 114 and 198. Now, the obvious meaning of this clause in the statute, seems to us to be, that no grant, assignment, declaration, or creation of a trust by any person, shall be proved without writing. Whenever the trust is founded upon the agreement or declaration of a party, a writing is essential; but when a man purchases land, and takes a conveyance in the name of a third person, the ownership of the money is neither a grant, assignment, declaration, nor creation of

a trust by any person. The trust that results from the ownership of the money is a mere creation of the law, and not founded on any agreement or declaration whatever.

Independently of the proviso, therefore, the statute could hardly be construed to render it necessary that the ownership of the purchase-money should, in such a case, be proved by some writing, in order to raise a resulting trust; but whatever doubts there might have been without the proviso, it is believed to be now settled everywhere, except in Massachusetts, that the ownership of the purchase-money paid for land conveyed, may be proved by parol evidence, in order to raise a resulting trust: Sugd. Law of Vend. 416, 417; *Lench v. Lench*, 10 Ves. jun. 511; 2 Fonbl. 118, note; *Steere v. Steere*, 5 Johns. Ch. 1 [9 Am. Dec. 256]; *Botsford v. Burr*, 2 Id. 405; *Finch v. Finch*, 15 Ves. 50; 1 Johns. Ch. 582.

Another question which this case presents for our decision is, whether the interest of a *cestui que trust* in land can be transferred in satisfaction of a debt, by the extent of an execution upon the land. The statute of February 15, 1791, entitled "An act subjecting lands and tenements to the payment of debts," etc., sec. 1, enacts: "That all lands and tenements belonging to any person in his own proper right in fee, shall stand charged with the payment of all just debts owing by such person, as well as his personal estate, and shall be liable to be taken in execution for satisfaction of the same:" 1 N. H. Laws, 181. This statute does not, in express terms, make any estate in lands liable for the payment of debts, except an estate in fee. But it seems to have been universally understood in this state, for a period running back beyond the memory of any who now belong to the profession of the law, that all real estate of every description was subject to be taken by an execution to satisfy a debt. Thus, estates for life, and remainders and reversions, and even the right in equity which a mortgagor has to redeem land mortgaged, have always been considered as liable to an extent upon execution, to satisfy the debts of those to whom they belonged. The statute of July 3, 1822, entitled "an act making provision for the sale, on execution of all rights in equity, of redeeming real estate mortgaged," has been understood to operate only to change the mode of applying the right of redemption to the satisfaction of the debt from an extent, to a sale upon the execution. No doubt could ever, at any time, have been expressed in any court, that all these interests in land were liable to be taken by execution; otherwise, further provisions

on the subject would, without question, have been made by the legislature.

Indeed, while the statute has seemed to show that nothing less than an estate in fee-simple was liable to an extent, yet in practice, almost every species of interest which a man can have in land, has been made so liable. We have endeavored to ascertain how this has happened, and the following is the best explanation which has occurred:

The statute of February 15, 1791, which we have before mentioned, was copied verbatim from the provincial act of the 4 Geo. I., cap. LXVI. sec. 1, which was passed in 1718: Prov. Laws, 90. The English statute of the 5 Geo. II., entitled "An act for the more easy recovery of debts in his majesty's plantations and colonies in America," sec. 3, enacted "That from and after the twenty-ninth September, 1732, the houses, lands, negroes, and other hereditaments and real estates situate or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands, of what nature or kind soever, owing by any such person to his majesty, or any of his subjects; and shall and may be assets for the satisfaction thereof, in like manner as real estates are, by the law of England, liable to the satisfaction of debts due by bond, or other specialty:" Prov. Laws, 235.

The statute was printed here among the laws of the province, and as it rendered every species of real estate liable to pay the debts of the owner, it is probable that previously to the revolution it was the practice under this statute to take, by execution, whatever interest a debtor had in land. The law remained the same after the revolution. And it does not appear that the revision of the said provincial act of the 4 Geo. I., cap. LXVI, in 1791, was ever supposed to change any principle of law on this subject in the least. The province act was merely copied without alteration, and the English statute of the 5 Geo. II., some of the provisions of which should have been copied into the act of 1791, has remained in force from necessity, preserved by that clause in the constitution which declares that "all the laws which have heretofore been adopted, used, and approved in the province, colony, or state of New Hampshire, and usually practiced upon in the courts of law, shall remain and be in full force until altered or repealed by the legislature," and is still the law of the land here at this day.

It must be admitted that if the practice of extending executions upon lands mortgaged, as the estate of the mortgagor was

originally founded upon the said statute of the 5 Geo. II, it must have been by a very liberal interpretation of its terms. If it were now a new question it would certainly deserve consideration, whether the term "real estate" is broad enough to embrace a mortgagor's right in equity to redeem the land: *Russell v. Lewis*, 2 Pick. 508. But this practice is of too long standing and is the foundation of too many titles to be now questioned. A decision against the practice at this time would be productive of great mischief and inconvenience; the law must, therefore, be considered as settled in favor of the usage. And we are of opinion that the interest of a *cestui que trust* must stand on the same ground as that of a mortgagor, and while the right of a mortgagor shall be held to pass by an extent upon the land as his property, the interest of a *cestui que trust* must be held to pass in the same way.

It is also a question in this case whether, James Sanderson having the possession of the land, and actually living upon it at the time the demandant purchased, this must be deemed in law sufficient notice of the trust to this demandant. What shall be deemed constructive notice in cases of this kind, has been much discussed in courts, and we consider it as perfectly well settled that open exclusive possession is sufficient notice to all the world of any claim which he who is so in possession has upon the land. It is not to be supposed that any man who wishes to purchase land honestly will buy it without knowing what are the claims of a person who is in the open possession of it. It is reasonable, if men will buy in such cases without inquiry, that they should be presumed to have known everything which they might have learned upon due inquiry: 3 Mass. 579; 2 Id. 508; 6 Id. 487; 4 Id. 637; 14 Id. 300; 16 Id. 406; 1 Pick. 164; 3 Id. 149; 5 B. & A. 142; Sudg. 498; 19 Ves. 456; 10 Johns. 457; Newland, 509; 8 Johns. 137; 1 Johns. Cas. 53; 2 Ves. jun. 437; 2 Fonbl. 151, note; 1 Burr. 475; 10 Mass. 60; *Allen v. Anthony*, 1 Meriv. 282; *Taylor v. Stibbert*, 2 Ves. jun. 437; *Daniels v. Davison*. 16 Id. 250.

There is still one further question in this case. The deed under which the tenant claims the land has only one subscribing witness, and the question is, whether anything can pass by virtue of such an instrument.

It may be conceded that the instrument can not operate under our statute to pass any estate. But there is a consideration of money expressed in the deed, and this is sufficient to raise a use, which is executed by the statute of uses: 2

Saund. on Uses, 50–67. The instrument may, therefore, operate as a bargain and sale, and thus pass the land without the aid of our statute: *French v. French*, 3 N. H. 234.

We are, therefore, of opinion that as the demandant bought the land with notice of the trust, he can not, for the reason stated in the case of *Scoby v. Blanchard*, 3 N. H. 170, maintain this suit, and that there must be judgment on the verdict.

Followed and affirmed in *Upham v. Varney*, 15 N. H. 462, and in *Hutchins v. Heywood*, 50 Id. 491, in regard to the interest of a *cestui que trust* passing by the extent of an execution upon the land as his estate.

NOTICE OF INTEREST FROM POSSESSION.—See *Knox v. Thompson*, 13 Am. Dec. 246.

SABIN v. HARKNESS.

[4 NEW HAMPSHIRE, 415.]

HE WHO ERECTS GRAVESTONES to the memory of another may maintain an action for an injury done to them during his life-time. But after the decease of the one who reared them, the action for an injury thereto must be brought by the heirs of him to whose memory they were erected.

WRIT of error to reverse a judgment of the court of common pleas, rendered in an action of trespass prosecuted by the plaintiffs in error as executors of the last will of Darling Sabin, against Harkness, for taking and carrying away two gravestones, and converting them to his own use. It appeared from the bill of exceptions, that Darling Sabin, in his life-time, in 1816, erected in the Friends' burying-ground in Richmond, two gravestones at the grave of his deceased wife and daughter. Sabin died in 1823. The trespass complained of was committed subsequently to Sabin's death. The court instructed the jury that Sabin's executors had no right to maintain the action. Verdict and judgment for the defendant.

Handerson, for the plaintiffs in error.

L. Chamberlain and J. Parker, contra.

By Court, RICHARDSON, C. J. It seems that by the rules of the common law, those who have erected gravestones may maintain an action for any injury done to them during their life-time. But after their decease, the action in such a case belongs to the heirs of him to whose honor and memory the stones were erected: Co. Lit. 18, 6; *Frances v. Ley*, Cro. Jac. 366; *Corren's case*, 12 Co. 105; *Spooner v. Brewster*, 3 Bing. 136; *Pym v.*

Gorwyn, Moore, 878; *Spooner v. Brewster*, 2 Car. and P. 34. These rules seem to us to be founded on sound reason and good sense. Gravestones are erected to perpetuate the memory of departed friends, and to mark the spot where their ashes repose. Those who erect them must, in general, have and feel an interest in their preservation. And this is an interest which the law wisely protects. For no one is so likely to vindicate injuries done to these memorials as those who erected them. But when they who erected the stones are gone, as the heirs of those to whose memory they may have been erected must then have the deepest interest in their preservation, the law wisely leaves it to those heirs to vindicate the wrong. In these monuments neither executors nor administrators have any interest. They are fixed to the freehold, and belong to the heirs. Nor do they cease to be their property when severed from the freehold. When a man's property which is fixed to the freehold is severed, it does not thereby cease to be his property.

We are, therefore, of opinion that the judgment of the common pleas be affirmed.

HUNT v. HUNT.

[4 NEW HAMPSHIRE, 434.]

WILLS—WHERE THE PAYEE OF A NOTE wrote upon the back: "If I am not living at the time this note is paid, I order the contents to be paid to A. H.," and having signed it, died before the note was paid, it was held that the indorsement was testamentary, and entitled to probate as a will.

APPEAL from the decree of the judge of probate in this county, allowing a certain instrument as the last will and testament of Arad Hunt, deceased. The instrument was as follows:

"\$1000.

Brattleboro', April 28, 1813.

"For value received, I promise to pay Arad Hunt, or his order, one thousand dollars, within one year from this date, and interest.

"LUTHER WELD.

"Attest: Jonathan Hunt."

There were upon the note the following indorsements:

"March 21, 1814, received one year's interest. September 14, 1814, received forty dollars. November 1, 1814, received two hundred and four dollars. May 22, 1818, received thirteen dollars and six cents."

"If I am not living at the time this note is paid, I order the contents to be paid to Arad Hunt, 2d. Witness: Arad Hunt."

The testator died in February, 1825.

H. Hubbard, for the appellant, gave as reasons for his appeal, that the instrument had none of the formalities of a will; that it was not sealed, was not witnessed; that no executor was appointed; that it was not intended as a will; that the note was made in Vermont, where the maker resided, having no property in this state; and that administration of all the estate of the deceased, within the jurisdiction of the judge of probate, has been long since granted by said judge, and is still in force.

Handerson, contra, in support of the decree below, cited: *Coxe v. Basset*, 3 Ves. jun. 157; *Hobberfield v. Browning*, 4 Ves. 200; *Morrell v. Dickey*, 1 Johns. Ch. 155; *West's case*, Moore, 177; *Chaworth v. Beech*, 4 Ves. jun. 555.

By COURT. It is not disputed in this case, that the deceased signed the writing which is offered for probate. There is no evidence that he ever abandoned the original intention with which he made the writing; but it is objected that the writing is not in its nature testamentary. We think, however, that the authorities adduced by the appellee's counsel are decisive to show that the writing is testamentary, and as such, entitled to probate: *Lovell on Wills*, 160; *Wentworth's Office of Ex'rs*, 261; *Godolphin*, 67; *Akerman v. Burroughs*, 3 Ves. & B. 54.

Decree of the court below affirmed.

HUTCHINS v. SPRAGUE.

[4 NEW HAMPSHIRE, 469.]

WHERE, TO DEFRAUD CREDITORS, a debtor transfers goods to one who *bona fide* pays, or assumes to pay, on account of the goods, debts to the full value of such goods, the transferee can not afterwards be charged as the trustee of the debtor.

QUESTION reserved upon the issue joined, whether Carlton, co-defendant, and alleged trustee of Sprague, had in his hands at the time of the service of the writ, or at any time since, any money, goods, chattels, rights or credits, of Sprague. It appeared in evidence, that Sprague had, by three bills of sale, conveyed to Carlton goods to the value of six hundred and sixty-four dollars and twenty-one cents, and had assigned to him notes and accounts to the amount of one thousand four hundred and ninety-two dollars and sixty-nine cents, upon which the latter had collected one hundred and forty-two dollars and nine cents. The bills of sale and assignments were

absolute on their face; but evidence was introduced showing that they were accompanied with a secret trust, rendering them fraudulent. Carlton then showed, that at the time he took the bills of sale, he assumed to pay a debt due from Sprague, and that Sprague was indebted to him, Carlton, in an amount greater than the value of the goods, together with all that had been received on the notes and accounts.

The court being of opinion that if the sale were fraudulent the trustee had a right to retain in his hands the amount of what he had paid, or assumed to pay, before the service of the writ in this case upon him, and that amount exceeding the value of the property which the trustee received, directed a verdict for the trustee, subject to the opinion of this court.

Bell, for the trustee. An insolvent debtor may prefer a creditor: *Wilkes v. Ferris*, 5 Johns. 335 and 412 [4 Am. Dec. 364]; *Ogden v. Jackson*, 1 Id. 370; *Estwick v. Caillaud*, 5 T. R. 420; *Pickstock v. Lyster*, 3 M. & S. 371. The whole value of the property transferred to Carlton was not sufficient to pay his debt, and, therefore, there could be no fraud on other creditors: *Oliver's Convey.* 561; *Thomas v. Goodwin*, 12 Mass. 140. If the transaction be fraudulent in law, but not in fact, Carlton would be entitled to retain for his advances and his debt: *Murray v. Riggs*, 15 Johns. 571; *Thomas v. Goodwin*, 12 Mass. 140. The plaintiff can claim only "the right and credit" of the debtor, and even if the transaction were fraudulent, as the debtor could not impeach it, the plaintiff could not.

Goodall and J. Parker, contra. The transfer was accompanied with a secret trust; was therefore void, as against creditors: *Fermor's case*, 3 Co. 78; *Twyne's case*, Id. 80; *Wimbish v. Tailbois*, 1 Plowd. 51; Co. Lit. 357, b.; Com. Dig., Covin, B. 1, 2; Bac. Abr. Fraud, A.; Roberts' Fraud. Conv. 521, 547, n. b. 591, 596; *Harris v. Sumner*, 2 Pick. 129; *Hyslop v. Clarke*, 14 Johns. 458; *Cadogan v. Kennet*, Cowp. 434; *Edwards v. Harben*, 2 T. R. 587; *Wordall v. Smith*, 1 Camp. 332; *Hamilton v. Russell*, 1 Cranch, 309; *Hills v. Eliot*, 12 Mass. 31 [7 Am. Dec. 26]; *Sands v. Codwise*, 4 Johns. 598 [4 Am. Dec. 305]; *Jackson v. Brush*, 20 Id. 5; *Mackie v. Cairns*, 5 Cowen, 547 [15 Am. Dec. 477]; *Beach v. Catlin*, 4 Day, 284 [4 Am. Dec. 221]; *Merrill v. Meacham*, 5 Id. 341; *Numan v. Kapp*, 5 Id. 76.

The transfer being fraudulent, the whole property was liable to attachment, and no lien exists in favor of the assignee. It was liable to attachment and execution: 2 Pick. 129; *Widgery*

v. *Haskel*, 5 Mass. 144 [4 Am. Dec. 41]; *Sands v. Hildreth*, 14 Johns. 458; *Austin v. Bell*, 20 Id. 442 [11 Am. Dec. 297]; *Jackson v. Mather*, 7 Cowen, 301; if the vendor had died, the vendee would have been chargeable as executor *de son tort*: Yelv. 197; *Hawes v. Leader*, Cro. Jac. 271; 2 T. R. 588, 597; *Osborn v. Moss*, 7 Johns. 161 [5 Am. Dec. 252]. From the policy of the law no lien could exist in such a case: 16 Mass. 324; 2 Pick. 137; 4 Johns. 599; 14 Id. 465; *Riggs v. Murray*, 2 Johns. Ch. 582. And, finally, in support of their measure of endeavoring to reach the property by a trustee process, counsel referred to *Parker v. Kinsman*, 8 Mass. 486; *Dix v. Cobb*, 4 Id. 511; *Ingraham v. Geyer*, 13 Id. 146 [7 Am. Dec. 132]; *Clark v. Brown*, 14 Id. 271; *Allen v. Megguire*, 15 Id. 290; *Enos v. Tuttle*, 3 Conn. 27; *Naylor v. Fosdick*, 4 Day, 146 [4 Am. Dec. 187]; *Hatch v. Smith*, 5 Mass. 53; *Chealey v. Brewer*, 7 Id. 261.

By Court, RICHARDSON, C. J. It is not disputed in this case, that previous to the commencement of this action, certain goods, accounts, and notes passed from the principal into the hands of the trustee; nor is it disputed, that the amount due from the principal to the trustee, upon claims existing at the time the goods thus passed, together with the debt the trustee assumed to pay at that time, is greater than the value of the goods together with the amount of all the money that has been collected on the notes and accounts.

But it is contended, on the part of the plaintiffs, that the goods, notes, and accounts went into the hands of the trustee under a contract that was, with respect to creditors, fraudulent and void; that such a contract could give to the trustee no lien upon the goods and money received; and that, notwithstanding the debts due from the principal to the trustee may exceed the amount which has come to the hands of the latter, still the plaintiffs are entitled to recover, the trustee having no right to apply what he has received to the payment of the debt due to him from the principal. And the question is, whether fraud in the contract between the trustee and the principal would, under the circumstances of this case, render the trustee chargeable. If it would, there must be a new trial to ascertain if there were fraud; if it would not, then the trustee is entitled to judgment on the verdict.

It is very clear that if the contract between the trustee and the principal were fraudulent, and these plaintiffs had attached the goods while in the hands of the trustee, the plaintiffs must have held the goods; for as the only title which the trustee could

have shown, must have rested upon the contract he made with the principal; that being fraudulent and void, his title must have failed altogether. No lien could have been created by a fraudulent contract. When a debtor dies insolvent, and one of his creditors has specific property in his hands, on which he has no lien, upon the question whether such creditor can retain the property, and set up his debt as an answer to a claim of it by the executor or administrator of the deceased, the judges of the supreme court of Massachusetts have been divided in opinion, Jackson and Putnam, Justices, having been of opinion that the creditor might retain the property, and Parker, C. J., and Thatcher and Wilde, Justices, being of a contrary opinion. *Jarvis v. Rogers*, 15 Mass. 389.

In the case of *Allen v. Megguire*, 15 Mass. 490, it was decided that a mere creditor, having goods of his debtor in his hands, has no lien upon them, and may be charged as the trustee of his debtor on account of them. But in the case of *Thomas v. Goodwin and trustee*, 12 Mass. 140, it was decided, that where one who was summoned as trustee had received goods of the principal debtor under a fraudulent contract, but before the service of the process upon him had paid debts of the principal to the amount of the value of the goods received, he was entitled to be discharged.

As the fraud, in this last case, rendered void the contract under which the goods were received, it may seem, at first view, difficult to reconcile these two decisions, and to understand why the trustee might not protect himself by a debt previously contracted, as well as by the payment of money afterwards on account of the principal; but we think they may be reconciled on the ground stated in the last mentioned case, which is, in substance, that there is a *locus penitentiæ*, of which, if the trustee avail himself before the process is served upon him, by restoring the goods to the principal, he can not be charged; and that a *bona fide* payment to the value of the goods, made to the creditors of the principal, is tantamount to a restoration of the goods. And although the trustee might not have been able to avail himself of this principle for his protection, had the goods been seized in his hands by virtue of a writ of attachment on the goods of the principal, we think it just and reasonable to adopt and apply it in this case. However fraudulent the contract under which the goods went into the hands of the trustee might have been, if, before the service of the process, he had repented of the fraudulent purpose, and restored the goods to

the principal, it is clear he would have been entitled to be discharged in this case. And we see no reason why a *bona fide* payment of debts due from the principal to the full value of the goods, or even an actual and *bona fide* assuming to pay such debts to that value, should not be deemed equivalent in this case to a restoration of the goods.

We are, therefore, of opinion that there must be in this case Judgment on the verdict.

THE FOLLOWING COMMENT is made by C. J. Parker, in *Boardman v. Cushing*, 12 N. H. 105, 113: "In *Hutchins v. Sprague and Trustee*, 4 N. H. 463, where the plaintiff contended that the transfer of the property was upon an express design to defraud creditors, the court held that the trustee could not be charged. The opinion seems, from the report, to have been placed, somewhat, upon the ground that there was, in case of a fraudulent transfer, a *locus penitentiae*; and that if the vendee assumed *bona fide* to pay debts of the vendor, the fraud, to that extent, was thereby purged. But there was nothing in the facts of the case which could place it on that basis, all the assumption to pay having been made at the time of the alleged fraudulent transfer, and as a part of the agreement upon which the transfer was made. In order to sustain that decision on the facts upon which it was predicated, it must be held that a transfer, with an express view to defraud creditors, could not, in a trustee process, be held to be void, so as to deprive the trustee of such equitable right as he might have had in case the goods had been deposited, or pledged without fraud. It is not necessary, however, to go to that extent to decide this case, nor do we mean, at this time, to give an opinion upon a state of facts presenting conclusive evidence that the trustee held the property of the principal debtor by a transfer, not merely accompanied by a trust, which was not apparent—not under circumstances merely tending to mislead creditors, and therefore objectionable—but where the trustee held by virtue of an express fraudulent design and transfer. The good faith of any part of such a transfer is not readily perceived, and the opinion in *Hutchins v. Sprague* does not settle such a case, although the statement might, perhaps, have been such as fairly to present it."

In *Albee v. Webster*, 16 N. H. 362, 370, the principal case, together with *Thomas v. Goodwin*, 12 Mass. 140, is cited in support of the statement that "a sale may be fraudulent as to creditors on account of a secret trust accompanying it, but if by a subsequent agreement, before the creditors interfere, the secret trust is discharged and the sale is otherwise made valid, the fact that the trust once existed will not operate longer to vitiate the sale, the fraud being purged." Chief Justice Parker, who made this statement, says, in continuing, that the application of the principle to *Hutchins v. Sprague* is somewhat doubtful, because there was no subsequent agreement. "These are cases, it is true, where the transfer is rendered valid against creditors by subsequent transactions. The fraud is purged, as it is termed. But they serve to show that the sale is not to be avoided because something has been coupled with it of an illegal character, if in fact it has no operation against creditors."

MILLS v. STARK.

[4 NEW HAMPSHIRE, 512.]

NO MAN IS BOUND TO FENCE against cattle on the highway unless they are rightfully there. Cattle which escape from one man's land, through defects in his fence, upon the highway, and enter upon another's land through defects in his fence, were not rightfully on the highway.

REPLEVIN for cattle. Plaintiff and defendant were owners of closes on the opposite side of a highway. The plaintiff having put the cattle, his property, into his close, they escaped through a defective fence into the highway, and from the highway into the defendant's close, his fence being also defective. The cattle being so in the defendant's close, he took them damage *feasant*. The case was submitted for the opinion of the court upon these facts.

Fletcher, for the plaintiff.

Stevens, contra.

By Court, RICHARDSON, C. J. It must now be considered as settled in this state that no man is bound to fence against cattle that are upon the highways, unless they are rightfully there. *Avery v. Maxwell*.¹

The public have in highways only a mere right of passage, the soil and freehold being in those through whose lands the highways may have been opened: *Makepeace v. Worden*, 1 N. H. 16; 1 Burr, 143; *Lade v. Shepherd*, 2 Stra. 1004; *Jackson v. Hathaway*, 15 Johns. 447 [8 Am. Dec. 263]. And the owner of the soil in a highway may have trespass if the cattle of others do anything more than merely pass and repass: *Stackpole v. Healy*, 16 Mass. 33 [8 Am. Dec. 121].

The question, then, in this case is whether the cattle of Mills were rightfully in the highway. If they were, and escaped into Stark's inclosure through defects in his fence, which is agreed to have been insufficient and out of repair, he had no right to take them as a distress for the damage they had done, and the plaintiff is entitled to judgment. But if, on the other hand, the cattle were not rightfully on the highway, Stark was not bound by law to fence against them, and when they strayed into his inclosure, it was a trespass which rendered the taking of them lawful, and he is entitled to judgment. The case does not state to whom the soil of the highway belongs. But it is agreed that the land on one side of the way belongs to the

plaintiff, and on the other side to the defendant, and the presumption of law in such a case is, that their lands respectively extend *usque ad filum viæ*, so that the soil of one half of the road belongs to one and of the remaining half to the other: *Headlam v. Hedley*, 1 Holt's N. P. C. 463.

The general rule of the common law is, that every man is bound to keep his cattle upon his own land at his peril: 19 Johns. 385; 1 Cow. 75, note. This rule has, however, exceptions.

1. A man has a right to drive cattle along the public highways, and if in exercising this right, he use ordinary care and diligence, and the cattle escape into the adjoining inclosures without his fault, he is not liable for any damage they may do: *Doraston v. Payne*, 2 H. Bl. 527.

2. When a fence between the adjoining closes of A. and B. has been divided by agreement, or by the fence viewers, and the cattle of A. escape into the close of B., through defects in that part of the fence which B. is bound to repair, A., the owner of the cattle, is not answerable for any damage they may do there. But if, in such case, the cattle wander from the close of B. into the close of C., A. will be answerable, although they may go into the close of C. through defects in the fence which C. is bound to repair. But A., in such a case, may recover of B., in an action on the case, any damage he may thus sustain through defects in B.'s fence: 6 Mass. 99.

3. Another exception is supposed to have been created by the statute of February 8, 1791, entitled "An act relative to common fields and regulating fences," the ninth section of which enacts "that where any damage shall be done to any person whose fence is insufficient, and such damage shall happen through such deficiency of fence, by swine yoked and ringed according to law, horses fettered, and other creatures not prohibited from feeding on the highways or common, the person sustaining such damage may not impound such creatures so doing damage, nor shall he recover any damages therefor."

This clause has been construed to throw upon the owners of all closes adjoining highways, the burden of fencing them against all creatures lawfully in the highways for any purpose. Thus it has been imagined, that if I put my horse into the highway to graze, where the soil of the whole road is my freehold, and the horse wander into my neighbor's adjoining close, through defect of his fence, he has no remedy. And perhaps if all the inhabitants of a particular neighborhood, by common consent, permit their cattle to run at large and feed upon the highways

promiscuously, the cattle of each one may be considered as rightfully in the highway, so long as they remain there in any place where the soil belongs to any one of such neighborhood.

In this case the plaintiff was not exercising his right to drive the cattle along the highway when they escaped into the defendant's inclosure. It does not appear that there was any common understanding in the neighborhood, that their cattle should run at large, promiscuously, upon the highways through their lands. The plaintiff owned the soil of only one half of the road. His case then must be governed by the general rule, and does not come within any of the exceptions. When his cattle strayed from his pasture into the highway, they became trespassers, the moment they passed the thread of the road and entered the half of the way where the defendant was owner of the soil. They cannot, therefore, be considered as rightfully in the highway when they wandered into the defendant's inclosure. He was not then bound by law to fence against them, and whatever might have been the condition of his fence, as he found the cattle in his inclosure doing damage, he had a right to take them as a distress for the damage they had done, and is clearly, upon the case stated, entitled to judgment.

Judgment for the defendant.

Fencing against cattle on highways. See *Stackpole v. Healy*, 8 Am. Dec. 121, and note.

GEORGE v. HARRIS.

[4 NEW HAMPSHIRE, 533.]

PROMISES OF SUBSCRIBERS to contribute specified sums for the erection of a public building are binding, and where the building has been erected, an action may be sustained against one to recover what he subscribed.

PAROL evidence is inadmissible to vary the terms of such a promise.

ASSUMPSIT upon a certain writing, in the words and figures following:

“For the purpose of providing a suitable court-house in the town of Plymouth, and to have said town continue a half shire, we, the subscribers, severally promise to pay the sums set against our respective names, or so much thereof as may be necessary for said purposes, payment to be made to Arthur Livermore, in trust for the use of us subscribing fifty dollars or upwards, provided some person will give half an acre of land suitable, in the opinion of the last-mentioned subscribers, for the site of a court-house. April 29, 1822.” Verdict for the plaintiffs by consent, subject to the opinion of the court upon the

following case. The above writing was signed by twenty-nine persons, each subscribing certain sums, and opposite the defendant's name was set the sum of one hundred dollars. William Webster, on the fifteenth of November, 1822, gave half an acre of land in said Plymouth, suitable, in the opinion of a majority of those subscribing fifty dollars and upwards, for the site of a court-house, and a suitable court-house was erected thereon, under the direction of a majority, and to erect and finish said house it was necessary to expend the whole amount subscribed. But the defendant refused to pay the sum by him subscribed. When the defendant put his name to the said writing, one of the other subscribers, who had the paper and solicited subscriptions, told the defendant that the new court-house should be erected on the site of the old court-house, and that he should not be held liable to pay if it were erected in any other place. The court-house was, in fact, erected in a different place.

Bell, for the plaintiffs.

Sullivan, attorney-general, of counsel for the defendant.

By Court, RICHARDSON, C. J. It has been decided in Massachusetts that when one subscribes, with others, a sum of money to carry on some common project, lawful in itself, and supposed to be beneficial to the projectors, and money is advanced upon the faith of such subscription, an action for money paid may be maintained against a subscriber for the amount of his subscription, or such portion of it as may be equal to his proportion of the expense incurred: *Bryant v. Goodnow*, 5 Pick. 228; *The Trustees of F. A. v. W. Allen*, 14 Mass. 172; *Homes v. Dana*, 12 Id. 190. But in the case now before us there is no count for money paid, although the facts stated would, if the decisions in Massachusetts are correct, most clearly entitle the plaintiffs to judgment on such a count. For it is stated that these subscribers have built a court-house, and that all the money subscribed was necessary for the purpose, so that the sum subscribed by the defendant must have been advanced by the other subscribers on their account.

And we are of opinion that if there was no fraud or deception in the case, this action may be maintained upon the subscription paper. There were twenty-nine persons who were desirous that the courts should continue to be holden in Plymouth, and were willing to contribute certain sums towards the erection of a court-house, that they might continue to be holden there. A written agreement was made that each of the twenty-nine

persons should pay to an individual a particular sum; that so much of the whole sum subscribed as should be necessary should be expended in the erection of a court-house, and that the residue, if any, should be returned to the subscribers respectively. There was a direct promise by each to pay, and a sufficient consideration is apparent from the nature of the transaction. The consideration upon which the promise of each is founded, is the promise of the rest to contribute to an object, which all were desirous to accomplish: *Trustees in Hanson v. Stetson*, 5 Pick. 506.

But the defendant relies for an answer to the action on the fact that he was told by one of the subscribers, when he put his name to the paper, that he should not be holden to pay unless the new court-house should be erected where the old court-house stood. We are, however, of opinion that he cannot be permitted to avail himself of this circumstance as a defense. His promise is direct, positive, unconditional, and in writing, and parol evidence is inadmissible to contradict or vary such a contract. He agreed to give the amount he subscribed, for the erection of a court-house on land suitable, in the opinion of certain subscribers, and to be given for the purpose. Nothing is said of the site of the old house.

There is another reason why the defendant ought not to be permitted to avail himself of any private understanding between him and another subscriber. He put upon the paper an unconditional promise to pay, and this may perhaps have induced others not only to subscribe, but to pay, and his attempt now to shield himself under such private understanding may be a fraud upon others who were thus induced to subscribe and pay.

This objection can be removed only by showing that before anything was done he notified the other subscribers that he should withdraw his name from the subscription paper. But for aught that appears he may have stood and seen the other subscribers erect the buildings without objecting to pay until the work was accomplished.

Judgment on the verdict.

Cited in *Berkeley Divinity School v. Jarvis*, 32 Conn. 421, and *Trustees v. Garvey*, 53 Ill. 403, as deciding that the mutuality of the promises of the subscribers furnished a sufficient consideration to support the legal obligation arising from such subscription.

LIABILITY FOR SUBSCRIPTION.—See *Phillips' Academy v. Davis*, 6 Am. Dec. 162, and note; *Goshen Turnpike v. Hurtin*, Id. 273; *Dutchess Cotton Mfy. v. Davis*, 7 Id. 459.

CASES
IN THE
SUPREME COURT
OF
NEW JERSEY.

THE STATE v. POTTS.

[4 HALSTED, 26.]

INDICTMENT FOR FORGERY setting forth the counterfeit note according to its tenor need not aver the loss or destruction of such note, and upon proof of its mutilation or destruction by the defendant, other proof of its contents may be admitted in evidence.

A FULL DESCRIPTION OF THE FORGED INSTRUMENT must be set forth in the indictment, or the omission to do so excused by proper averments.

A DIFFERENCE, OR EVEN A CONTRADICTION IN THE TESTIMONY of witnesses for the prosecution, does not defeat an indictment.

WHETHER OR NOT THERE IS A VARIANCE between the note set forth in the indictment and that produced on the trial is a question of fact for the jury, and their verdict is conclusive.

THE opinion states the case.

Sims and Halsted, for the state.

Sloan and Wall, for the defendant.

By Court, EWING, C. J. The defendant, Thomas Potts, was convicted at the court of oyer and terminer of the county of Burlington, upon an indictment for passing one counterfeit bank note, and for having another in his possession with intent to pass it. At the instance of his counsel judgment was suspended in order that certain points raised in the progress of the trial might be submitted to the consideration of this court; and these points having been fully argued by counsel on both sides, now stands for our opinion.

1. In the first place, the counsel of the defendant insist that the first count of the indictment was not sustained, because

such a note as therein described was not produced. The first count charges the defendant, in the usual form, with having uttered and published a counterfeited bank note of the Farmers & Mechanics' bank, "the tenor of which false, forged and counterfeited paper writing is as follows, that is to say," and the note is then set out at full length. On the trial three parts or pieces of the note were produced; the two figured ends with a portion of the body of the note attached to one of them; and another portion of the body of the note, containing a part of the vignette, the number, the sum thrice expressed, twice in numbers and once in letters, a part of the date of the note and of the name of the bank, and of Philadelphia, the place of its establishment, and the whole of the counterfeited signature of the president. The remainder of the note was wanting. It was proved that while the defendant was under examination, previous to his commitment, he seized the note then lying on the table before the magistrate and threw it into the fire, from which it was promptly rescued, but not until those parts wanting at the trial had been destroyed. By the testimony of the magistrate, and of another person then present who had carefully examined it, the contents of the destroyed parts were proved. The parts produced were amply sufficient to enable a competent person to judge and give evidence whether it was a genuine or counterfeited instrument.

The counsel of the defendant insisted that as the indictment set out the note by its tenor and at length, the state was bound to produce on the trial exactly such a note as is there described; and having made no averment of its injury or destruction, the contents of the wanting parts could not be supplied by other evidence. To sustain their position they rely, in the first place, on the rule in civil actions requiring in cases of profert the actual production on trial of the instrument declared on, and admitting no substitution of secondary evidence by proof of loss and destruction, unless an averment to that effect be made in the declaration.

This reasoning can not prevail. Not the slightest analogy exists between the cases, and what may be a very sound and safe rule in the one may be wholly improper in the other. In the first place, a profert in an indictment is never made. It charges that the defendant uttered the note and states it with due particularity. A declaration alleges that the defendant made the deed, "which the plaintiff brings here into court," and which, as is familiarly known, the plaintiff did, especially in the

time of the year books and of *ore tenus* pleading, actually produce in court before the judges, where it remained during the term and was then taken by the plaintiff, unless denied by the plea, when it remained in the hands of the *custos brevium* until the trial of the cause. Secondly, this rule, respecting profert and its effect, relates only to deeds, and not even to every kind of deeds; but it never embraced promissory notes or bills of exchange. A declaration may with the utmost minuteness describe a note or bill without any suggestion of its loss, yet on the trial proof of the loss or destruction and of its execution and contents will maintain the action. Why, then, should the rule contended for exist where a note or bill becomes in question in a criminal case? Thirdly, the reason for making a profert, as given by Lord Coke, 10 Co. 92, are: 1. As to the composition of the words, to be sufficient, and the court shall judge that; 2. That it be not razed or interlined in material points or places, and upon that also, in ancient time, the judges did judge upon their view, but of late times have left to be tried by the jury; 3. That it may appear to the court and to the party if it was upon condition, limitation, or with power of revocation. "And these," says Coke, "are the reasons of the law that deeds pleaded in court shall be shewed forth to the court." But it is most manifest that the first of these reasons is fully satisfied by the rule which requires the forged instrument, or so much as may suffice to show it to be the subject of forgery, to be set out in the indictment, and that the others can have no possible application.

The making of a profert in a declaration in a civil action regulates the kind of evidence to be produced on the trial; but as a profert in criminal cases does not exist, either in principle or in practice, the manner in which the charge is set forth in the indictment does not govern the kind, though it may affect the degree or quantity of evidence requisite to sustain it. Thus, if an indictment charge that the defendant uttered a forged instrument "of the tenor following," or "in the words following," the contents of the instrument as laid must be strictly and literally proved. A very slight variance is fatal. But this mode of expression does in no wise govern the kind of evidence, whereby such proof is to be made, nor require that it be made by written evidence, when if some other mode of expression had been adopted a different or inferior species of evidence would have sufficed. The indictment sets forth the facts necessary to constitute the crime of forgery or publication of forgery. How these facts are to be proved depends on the general rules of

evidence, and these are the same in both civil and criminal cases. The best practicable is to be produced. The writing, if in existence and in the power of the state. If lost, destroyed, or in the possession of the defendant, a copy or parol evidence of its contents. It is true that in certain cases the indictment must contain an averment of the loss or destruction of the instrument, or some other proper cause, for the omission of a full description; as where, after the forgery or publication of the instrument, it has been lost, destroyed, or passed into the hands of the defendant, and yet sufficient of its contents can be proved to show it to be an instrument of which a forgery may be perpetrated. The want of a more full description must be excused by proper averments, but this is a rule of pleading, not of evidence, to prevent an exception to the indictment, not to legitimate secondary or inferior evidence: *Commonwealth v. Houten*, 8 Mass. 107;¹ *The People v. Kingsley*, 2 Cowen, 522 [14 Am. Dec. 520].

The counsel of the defendant relied in the next place, for the support of their objection to the conviction under the first count, upon a passage in Archbold's Treatise on Criminal Pleading and Evidence, page 64, in which he says, when the matter of a written instrument is introduced in a pleading by the words, "according to the tenor following," or, "of the tenor following," etc., any, the slightest variance between the instrument set out and that produced, is fatal. And hence it was inferred that where the instrument is introduced as in the indictment before us, by the tenor, the instrument itself must always be produced; but, I apprehend, this is not a correct exposition of the passage, nor the meaning of the author. The rule respects not the necessity of producing, but its necessary correspondence whenever produced, with the recital in the indictment, or, in other words, that the *allegata* and *probata* must strictly agree: for, otherwise, he must be understood to maintain that an indictment for forgery can not be supported without, in all cases, the actual production of the forged instrument. He gives no precedents of indictments, he lays down no rules of proof, such as were stated at the bar, or any others, to be used when the forged instrument has been mutilated or destroyed, yet he surely does not intend to say that if the accused can by dexterity possess himself of the instrument, or by audacity destroy it, he may escape with impunity, and point the finger of scorn at public justice. The rule is laid down somewhat differently, and cer-

1. *Commonwealth v. Houghton*, 8 Mass. 107.

tainly with more accuracy and precision by both Starkie and Chitty. If, under such an allegation, say they, the prosecutor fail in proving the instrument verbatim as laid, the variance will be fatal: 1 Stark. Cr. Pl. 190; 1 Ch. Cr. L. 158.

The doctrine applicable to the subject before us appears to be settled in the English courts, and has been expressly ruled in the supreme court of Massachusetts. Chitty, in his treatise on criminal law, 1 vol., 389, says parol evidence may be given of the contents of a forged bill of exchange, upon proof that it is in the prisoner's possession. And upon the same principle where the defendant has swallowed the instrument, for the forgery of which he is indicted, parol evidence may be given of its contents, without any notice to produce it. And these positions are laid down by him after having stated (pages 155 and 158), that it is necessary to set forth the instrument in the indictment. In 14 East, 276, Lord Ellenborough cites and approves of the case of *Rex v. Spragge*, tried before Justice Buller on an indictment for forging a note which he afterwards got possession of and swallowed, and parol evidence was permitted to be given of the contents of the note. It is true the report does not say the indictment did not contain an averment of the destruction, but it is clear there was none, or no question would have arisen; and it doubtless conformed to the English treatises which require, and the English precedents which contain, so far as they have come under my research, a recital of the instrument in the indictment. In the case of *The Commonwealth v. Snell*, 3 Mass. 82, the defendant was convicted of uttering and passing to one Clement Bunker, a promissory note purporting to be subscribed by one Raymond Smith, as a good note, knowing it to be forged. The report does not say that the indictment did not aver the loss of the note, but it is manifest from the whole case that it did not; and in 2 Russel on Crimes, 1411, the American edition by Davis, the solicitor-general of Massachusetts, in a note containing this case, it is expressly stated that nothing was alleged in the indictment, as an excuse for not producing the instrument. The falsity of the note and the defendant's knowledge, the passing of it by him, and the secreting of it by Bunker and a brother of the defendant, so that it could not be produced, were shown. The contents of the note were proved by a person who had seen and taken a copy while in the hands of Bunker. The court observed, that "on the trial of an indictment for forging an instrument, or knowingly passing it as genuine, no rule of law required as indispensable the production to the jury of the forged instrument;

that the instrument alleged to be forged must be so far described in the indictment, that it may appear that forging it is an offense; and this description, as well as the forgery, must be proved by the best evidence the nature of the case will admit. The production, therefore, of the instrument in evidence must not be dispensed with where it is practicable; but if the instrument can not be produced, the prosecutor being in no fault, and more especially if it be secreted to protect the offender, the next best evidence will be admissible, and if it satisfy the jury of the defendant's guilt, it is a legal foundation for a verdict against him. It may often happen that when the instrument is not produced there may be no other evidence which will satisfactorily prove the description or the forgery of it, in which case the defendant must be acquitted."

I have examined this point at some length out of deference to the arguments of the defendant's counsel, and to the firm reliance they placed upon it, at greater length, perhaps, than was requisite after what was said by this court in *The State v. Gustin*, 2 South. 744, which, though not entitled to the full weight of an adjudication on the very point, would have sufficed to rule the present case unless such force of principle or precedent had been here produced as would have required us to re-examine the subject. The indictment against Gustin was for forging a promissory note. Judge Southard, in delivering the opinion of the court on a motion to quash it, says: "The objection to it is that the tenor of the note is not set out, nor any circumstances showing that it was out of the power of the jury to set it out, and the objection is well taken. The instrument must be shown that the court may see whether it be an instrument of which there can be a forgery by the statute. There is a distinction between the indictment itself and the proof necessary to sustain it. If the tenor be set out, proof that the instrument is not within the power of the prosecutor is sufficient to authorize other proof as to its contents, and proof which will justify conviction."

2. The second point raised by defendant's counsel is founded on the fact, that on the trial one of the witnesses on the part of the state testified that the name of the cashier subscribed to the counterfeit note, and which had been on one of those parts destroyed by the fire, was written H. Kuhl, and another testified that it was written Henry Kuhl, as charged in the indictment. It was said the state was bound to prove the note fully and explicitly, and not to require the jury to guess or conjecture; and hence it was argued, as these witnesses differed, the indictment

was not sustained. It is true the note must be proved as charged, and the jury must be satisfied beyond uncertain surmise. But it is not less true that an indictment does not fail because one witness differs from another in points more or less material, or even in some directly contradicts him. The state was bound to prove that the name subscribed to the note was Henry Kuhl. Whether it was so subscribed was a question of fact. The jury may have had ample reasons for preferring and reposing on the evidence of him who testified that it was written Henry; and as the cause was properly put to them by the court, the verdict they have rendered stands for proof that the note was proved as laid fully and explicitly, or at least to their satisfaction, and that they attained an higher degree of certainty than guess or conjecture.

3. The third count charges the defendant with having in his possession, with intent to pass, a counterfeit bank-note of the Philadelphia Bank. The note is set out in the indictment, and is signed "J. Reed," President. The counterfeit note produced on the trial is, as alleged by the defendant's counsel, signed "J. Read," and the variance is insisted to be fatal. Upon the note, since the name was written, a stain from some extraneous matter has rendered it difficult for the keenest eye to discern whether the third letter of the surname be e or a. What might have been the proper course on the trial had the variance been plain, palpable, and undisputed, it is unnecessary to say. The court very properly referred the fact to the jury, with suitable directions, and their verdict shows that they found in point of fact no variance, but the note correctly set forth in the indictment.

On the whole, we find no ground to distrust the verdict.

An indictment for forgery should set forth the instrument charged to be forged *in hæc verba*, unless it be in the hands of the accused, when that fact should be averred in the indictment: *State v. Parker*, 6 Am. Dec. 735; in *The People v. Kingsley*, 14 Id. 520, it was held to be sufficient for the indictment to describe the instrument in general terms, and to set forth the excuse for not setting out a copy, or for not describing it more particularly, where the instrument is lost or in the possession of the accused.

HOSKINS v. PAUL.

[4 HALSTED, 110.]

GOODS OF A JOINT LESSEE FOUND ON THE DEMISED PREMISES may be distrained for rent, although previously assigned by him for the benefit of his creditors.

EXEMPTION FROM DISTRESS.—Unfinished cloth at a fulling mill is exempt from distress if it is the property of a stranger, but not if it belongs to the tenant himself.

REPLEVIN. The opinion states the case.

Kinsey, for the plaintiffs.

Wall, for the defendants.

By Court, EWING, C. J. Peter Barker, John Colvin, and Joseph E. Garwood were lessees of a fulling mill for which six months' rent became due on the twenty-fifth of September, 1822, to John Paul and Joseph M. Paul, the landlords.

On the twenty-sixth of October, 1822, Peter Barker made an assignment of all his real and personal estate to Hoskins and Kinsey, the plaintiffs in this case, for the benefit of his creditors, according to our statute of the twenty-third of February, 1820. On the fifth of November, 1822, the landlords distrained certain pieces of unfinished satin and kerseymere then in the fulling mill, which had been sent there by Barker previous to the assignment, for the purpose of being fulled, and which are part of the goods mentioned in the inventory accompanying the assignment. The validity of the assignment and the conformity to the statute of the proceedings of the assignees under it, are not brought into question. The assignees prosecuted an action of replevin, and now insist that the goods were not distrainable: 1. Because they were not at the time of the distress the goods of Barker, the tenant; 2. Because they were privileged from distress, having been sent to the mill in the way of trade.

1. By the eighth section of our statute concerning distresses, Rev. Laws, 201, it is declared to be lawful to take and seize as a distress for arrears of rent any of the goods and chattels of the tenant, and not of any other person, although in possession of such tenant, which may be found on the demised premises, except such goods and chattels as are by law privileged from distress. To understand the just operation of this section, and to give it a correct construction, it is necessary to recur to the common law as it stood at the making of the statute, and which has been thereby altered. At common law, whatever goods and chattels, except exempted under particular circumstances, as when sent there in the way of trade, and the like, the landlord found on the premises, whether they belonged in fact to the tenant or a stranger, were liable to distress for rent: 3 Bl. Com. 8. As if a stranger sent his horse or cattle on th

demised premises to pasture, they might be immediately distrained by the landlord; and so far was the rule considered to extend, that in the case of *Francis v. Wyall*, 3 Burr. 1498, it was held that a gentleman's carriage sent to a livery stable was liable to distress for rent due from the tenant of the stable.

The object of the alteration introduced by our statute, was to restrain the generality of the right of distress as it stood at common law, and to establish a rule more just in its operation, and more conformable to public utility and convenience. But neither the reason of the thing, the design of the legislature, nor the remedy intended, will justify the extension of the exemption to the goods now in question. The statute will not bear such a construction. The evil to be corrected was the injustice of seizing the property of a stranger, when it happened to be brought on some lawful occasion and for some lawful purpose, upon the premises, and applying it to the payment of a debt of the tenant. There is no such injustice in taking the property of the tenant, which may have been on the premises during the whole period of the demise, and up to the moment of seizure, though a short time before placed by him in a course of application to the payment of his debts. The palpable difference between the two cases is, that in the one, property which never belonged to the debtor is snatched from the innocent owner; and in the other, a mere preference over other creditors is given to the landlord, the payment of whose claim for rent is always a favored object of the law. In the one case, the property of a man, without fault and without compensation, is taken from him; in the other, no injury is really done to creditors, because all calculate on the liability of the goods to satisfy the arrears of rent. It is true, the legal ownership of the property is, by the assignment, passed from the debtor and vested in the assignees, but it is *sub modo* only; and the construction I have given to the statute is supported by the thirteenth section of the act respecting assignments: Rev. Laws, 676, which declares the assignee to have as full power and authority to dispose of the estate, as the debtor had at the time of the assignment.

2. According to the common law, goods otherwise liable to distress are, under certain circumstances, exempted; thus, corn sent to a mill, yarn at a weaver's, cloth at a tailor's shop, to be made into garments, and the like: Co. Lit. 47, a; and the principle doubtless extends to unfinished cloth sent to a fulling mill to be wrought. This protection is preserved by our statute.

“Such goods and chattels as are by law privileged from distress” are expressly saved from liability. But this is an exception to the general rule at common law subjecting to distress the goods even of a stranger found on the premises. It was designed for the encouragement and benefit of trade, and extends only to the goods of others, not to the goods of the tenant himself. These are not exempted, although on the premises, or sent thither by him to be wrought upon, according to his trade. Blackstone says: “The articles privileged are supposed, in common presumption, not to belong to the owner of the house, but to his customers.” 3 Bl. Com. 8. Hargrave, in note 295, on Co. Lit. 47, a, mentions some instances of exemption from distress, and then refers to the case of *Francis v. Wyatt* “for other cases, in which things, the property of strangers, are privileged from distress for the sake of trade and commerce.” In *Gisbourn v. Hurst*, 1 Salk. 249, the court state the rule to be that “goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employ, are, for that time, under legal exemption, and privileged from distress.” The true foundation of the exemption from distress in the excepted cases, is said to be “the detriment the common weal would suffer if such things should be liable to distress for rent.” Now it is manifest the common weal can suffer only by distraining the goods of strangers, and never by distraining those of the tenant himself.

We are therefore of opinion that the goods seized were liable to distress, and that judgment should be rendered for the defendants.

EXEMPTION FROM SEIZURE UNDER DISTRESS.—At common law, all movable chattels found upon the demised premises, whether belonging to the tenant, an under tenant, or a stranger, were, in general, distrainable for rent due to the landlord: 3 Blackstone's Com. 7; 3 Kent's Com. 476; Taylor on Land and Ten. sec. 583; *Gorton v. Falkner*, 4 T. R. 565; *Gilman v. Elton*, 6 Moore, 243; *Holt v. Johnson*, 14 Johns. 425; *Spencer v. McGowen*, 13 Wend. 256; *Connah v. Hale*, 23 Id. 462; *Kessler v. McConachy*, 1 Rawle, 435; *O'Donnell v. Seybert*, 13 Serg. & R. 54; *Karns v. McKinney*, 74 Pa. St. 387; *Howard v. Ramsay*, 7 Harr. & J. 113; *Reeves v. McKenzie*, 1 Bailey, 497; *Harvis v. Wickham*, 6 Leigh, 236.

But this invidious privilege of the landlord was found to be so inconvenient that numerous exceptions to the rule were introduced at a very early period in the history of the common law. Lord Coke thus classifies them: 1. “It must be of a thing whereof a valuable property is in some body, and therefore, dogs, bucks, does, conies, and the like, that are *feræ naturæ*, cannot be distreyned. 2. Although it be of valuable propertie, as a horse, etc., yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be distreined.

3. Valuable things shall not be distreyned for rent for benefit and maintenance of trades, which by consequent are for the commonwealth, and are there by authority of law; as a horse in a smith's shop shall not be distreyned for the rent issuing out of the shop, nor the horse, etc., in the hostry, nor the materials in the weaver's shop for making cloth, nor cloth or garments in a tailor's shop, nor sacks of corne or meale in a mill, nor in a market, nor anything distrayned for *damage feasant*, for it is in custody of law, and the like. 4. Nothing shall be distrayned for rent that cannot be rendered againe in as good plight as it was at the time of the distresse taken; as sheaves or shocks of corne, or the like, cannot be distrayned for rent, but for *damage feasant* they may be distrayned. But charretts or carts with corne may be distreyned for rent, for they may be safely restored. 5. Beasts belonging to the plow, *averia carucar*, shall not be distrayned (which is the ancient common law of England, for no man shall be distrained by the utensils or instruments of his trade or profession, as the axe of the carpenter, or the books of a schollar), while goods or other beasts, which Bracton calls the *animalia* (or *catella*) *otiosa*, may be distrained. 6. Furnaces, caudrons, or the like, fixed to the freehold, or the doores or windowes of a house, or the like, cannot be distrained. Lastly, beasts that escape may be distrained for rent, though they have not been *levant and couchant*." Co. Litt. 47, a. And in the leading case of *Simpson v. Hartopp*, Willes, 512, Willes, Ld. C. J., says: "There are five sorts of things which at common law were not distrainable: 1. Things annexed to the freehold. 2. Things delivered to a person exercising a public trade, to be carried, wrought, or worked up, or managed in the way of his trade or employ. 3. Cocks or sheaves of corn. 4. Beasts of the plow, and instruments of husbandry. 5. The instruments of a man's trade or profession. The first three sorts were absolutely free from distress; could not be distrained even though there were no other goods besides. The two last are only exempt *sub modo*; that is, upon a supposition that there is sufficient distress besides."

In England, as personal property became a matter of greater importance, and as the trade and commerce of the country increased, the courts manifested a disposition to extend the principle of exempting from distress the goods of a stranger found upon the premises demised. A statement of some of the cases in which such property was held to be so exempt will best illustrate the tendency of the decisions. In *Read v. Burley*, Cro. Eliz. 549, 596, a clothier sent wool to a spinner to be spun, and afterwards came with a horse to bring back the yarn. The spinner had no beam to weigh it, and they brought the horse and yarn to a neighbor's who had a beam to weigh it, and while they were in the house weighing it, the landlord distrained the horse and yarn for the rent. The majority of the judges, however, held that they were not distrainable, and in giving their opinion said: "For the trade of a clothier is *pro bono publico*, who ought to be allowed all necessary means; and without doubt cloth put to a weaver to be woven, or yarn in an house to be spun, are not distrainable; * * * and weighing it is as necessary as the former; wherefore the yarn brought thither for that purpose, and the horse which brought it, are privileged, and are not distrainable." Walmsly, J., dissented because it was not averred that it was a common beam or place for weighing, but he admitted that a horse brought to a mill, etc., would not be distrainable. Cowen, J., in *Connah v. Hale*, 23 Wend. 474, speaking of this case, says: "The case in Croke has always been considered a leading one. It has often been recognized as law to the full extent of the principle stated by a majority of the court." In *Simpson v. Hartopp*, Willes, 512, it was held that a stocking frame in actual use was not distrain-

able. In *Gilman v. Elton*, 3 Brod. & Bing. 75; S. C., 6 Moore, 243, the court decided that goods of the principal in the hands of his factor could not be distrained for rent due to the landlord of the factor. And Dallas, C. J., in that case said: "In like manner, therefore, and on the same principle of public convenience, a rule has been adopted in favor of trade and commerce, and as the landlord is protected under the general right of distraining, so goods of a certain description, and in certain situations, are protected in favor of trade and commerce." So in *Swire v. Leach*, 18 C. B. (N. S.) 479, 34 L. J. (C. P.) 150, goods deposited with a pawnbroker were held privileged from distress, although pledged for more than a year. And in *Miles v. Furber*, 8 Law R. (Q. B.) 77, goods deposited in a warehouse to be taken care of were held not liable to be distrained. In *Gisbourn v. Hurst*, Salk. 249, the court held that "goods delivered to any person exercising a public trade or employment to be carried, wrought or managed in the way of his trade or employ, are, for that time, under legal protection, and privileged from distress." In *Brown v. Shevill*, 2 Ad. & Ell. 138, a butcher sent a beast to another's shop to be slaughtered, and while there it was distrained, but the court held that it was not distrainable. In *Thompson v. Mashiter*, 8 Moore, 254, it was decided that goods sent by the owner to his factor for sale, and deposited by the latter in a warehouse belonging to a public wharf, at a weekly rent until such sale could be effected, were not liable to be distrained for rent due from the wharfinger to his landlord in respect to the wharf and warehouse. So in *Adams v. Grane*, 1 Cr. & Mees. 380, it was held that goods sent to an auctioneer to be sold on the premises occupied by him were privileged from distress for rent, and the court said "it is laid down as a general principle that the privilege exists in favor of commerce, trade, and public convenience."

On the other hand it was held in *Francis v. Wyatt*, 3 Burr. 1498; 1 W. Blackst. 482, that a carriage standing at a livery stable is distrainable for rent of the stable. This case has been frequently commented upon in subsequent English decisions, but does not seem to have been expressly overruled by any of them. On the contrary, it was followed in *Parsons v. Gingell*, 4 C. B. 545, where it was held that horses and carriages standing at livery are not exempt from distress. But the court, in *Youngblood v. Lowry*, 2 McCord, 39 [13 Am. Dec. 698], declined to follow it, and held that a horse sent to a livery stable to be cared for was not distrainable. In *Hellawell v. Eastwood*, 6 Excheq. 295, it was decided that "mules" used for spinning cotton, fixed by means of screws, some into the wooden floors of a cotton mill, and some by being sunk into the stone flooring and secured by molten lead, are at law distrainable for rent. The key to this decision may probably be found in the opinion of Parke, B., that "they never ceased to have the character of movable chattels, and were, therefore, liable to the defendant's distress." But Sir W. Page Wood, V. C., in the case of *Mather v. Fraser*, 2 Kay & J. 536, characterized the statement quoted above, a mere dictum. In *Wood v. Clark*, 1 Cr. & Jer. 464, it was held that a frame or machine given by a manufacturer to a workman to use at the latter's house is not privileged from distress, although it was admitted that materials given to the workman to be worked up at his house would be so privileged. In *Muspratt v. Gregory*, 1 Mees. & Welsb. 633; 3 Id. 677, the boat of the plaintiff, an alkali manufacturer, was lying in a canal cut to let boats up to the salt works to carry away salt, and while there to be loaded it was seized by the landlord, and was held not to be exempt from distress. So, in *Joule v. Jackson*, 7 Mees. & Welsb. 450, brewers' casks sent to a public house with beer and there left until they were empty, were held

liable to be distrained for the rent of the house. But in *Storey v. Robinson*, 6 T. R. 138, it was held that a horse with his rider on him can not be distrained *damage feasant*, Lord Kenyon, C. J., saying: "If it were permitted to a party to distrain a horse while any person is riding him it would perpetually lead to a breach of the peace."

It will be seen from an examination of the cases cited above that, notwithstanding some relaxation of the old common law rule in reference to distress, in England this privilege of the landlord is still recognized to a very considerable extent. In this country, however, the case is very different. "The tendency of our decisions is upon the whole against the right of distraining goods not the property of the tenant:" Taylor on Land. and Ten., sec. 584; *Brown v. Sims*, 17 Serg. & R. 138, *Riddle v. Welden*, 5 Whart. 1; *Connah v. Hale*, 23 Wend. 475; *Youngblood v. Lowry*, 2 McCord, 39 [13 Am. Dec. 698]; *Stone v. Matthews*, 7 Hill, 428; *Himely v. Wyatt*, 1 Bay, 102; *Walker v. Johnson*, 4 McCord, 552; *Owen v. Boyle*, 22 Me. 47; *Bevan v. Crooks*, 7 Watts & S. 452; *Cadwalader v. Tindall*, 20 Pa. St. 422; *McCreery v. Claflin*, 37 Md. 435; *Giren v. Blann*, 3 Blackf. 64; *Reynolds v. Shuler*, 5 Cow. 323; *Briggs v. Large*, 30 Pa. St. 287.

In the case of *Brown v. Sims*, 17 Serg. & R. 138, Gibson, C. J., said: "The right to distrain the property of a stranger rests on no principle of reason or justice. It is a feudal prerogative handed down from times when chattels were of little account, and when it may have been impolitic, if not unreasonable, to embarrass the lord with responsibility to one who had thrust his property in the way of the remedy to compel a performance of the services. But commerce, which wrought a change in the habits and pursuits of men, and gave an importance to personal transactions, necessarily produced a relaxation of the rule, so as to admit of a variety of exceptions, some of them of early origin, in favor of trade. These have been so often enumerated that it would be useless to pass them in review here, particularly as no two of the judges seem to have taken the same view of the principles applicable to them, or of the ground on which they were sustained. But be this as it may, there is little reason to doubt that the exceptions will, in the end, eat out the rule. The most plausible argument in support of it is that as the landlord is supposed to have given credit to a visible stock on the premises, he ought to be allowed recourse to everything he finds there. But this recourse can not be presumed to have been in the view of the parties, where it would defeat the very object of the contract. * * * Where the course of the business must necessarily put the tenant in possession of the property of his customer, it would be against the plainest dictates of honesty and conscience to permit the landlord to use him as a decoy, and pounce upon whatever should be brought within his grasp, after having received the price of its exemption in the enhanced value of the rent." And Bay, J., in delivering the opinion of the court in *Youngblood v. Lowry*, 2 McCord, 39 [13 Am. Dec. 698], said: "I am very much disposed to think that this whole system of distress for rent was inapplicable to the circumstances originally of the British colonies, where the ancient feudal system was utterly unknown, and nothing but colonial dependence could have permitted it to gain a footing in America in subservience to British policy."

WOODWARD'S EXECUTORS v. WOODWARD.

[4 HALSTED, 115.]

LEGACIES MAY BE ATTACHED IN THE HANDS OF THE DEVISEE, for the legatee's debt, if they are charged upon real estate; but mere personal legacies can not be attached.

MOTION to quash writ of attachment. The opinion states the case.

Wood, for the motion, contended that the legacy was not attachable, because it was a mere trust or equitable demand. The sheriff, in attachment, can only levy on common law rights. Charges on real estate are not subjects of common law jurisdiction. An action at common law will not lie to recover them, unless there has been a promise from the devisee to the *cestui que trust*: *Boone v. Durand*, 1 Desauss. 588; 3 Cruise Dig. tit. Prescription, Ch. 2 sec. 59; *Heycock v. Heycock*, 1 Vern. 256; Serg. on Attach. 86. This court, in the case of *Thorn v. Wright*, decided that a personal legacy can not be attached, and that decision must govern this case.

Wall, contra, contended that the debtor ought not to be allowed to say that his property should not be taken for the payment of his debts: 4 Binn. 373. The rule that legacies can not be attached applies only to pecuniary legacies, and is not applicable to legacies charged upon land: Serg. on Attach. 86; *Livingston v. Livingston*, 3 Johns. 189.

By Court, EWING, C. J. Abner Woodward, by his will dated the twenty-second of April, 1825, and proved the thirteenth of November, 1825, devised a plantation to his son, Apollo Woodward, in fee-simple, and bequeathed to his son Horace N. Woodward, the sum of four thousand dollars, which he ordered his son Apollo to pay, and directed that the plantation above mentioned should be bound for the payment of the legacy by his son Apollo.

After the decease of the testator, the executors sued out a writ of attachment against Horace N. Woodward for a debt due to the deceased in his life-time, which writ was returned to the term of February, 1826, by the sheriff; that he had attached the above-mentioned legacy in the hands of Apollo Woodward.

The counsel of Horace N. Woodward, the defendant in attachment, moves to quash the return, and insists that the legacy is not attachable, first, because not suable at law, but in equity only; and second, from analogy to the case of a personal legacy,

which has been held in this court not to be liable to attachment in the hands of executors.

1. The statute respecting attachments authorizes the sheriff to attach the goods and chattels, rights and credits, moneys and effects, lands and tenements, of an absconding or absent debtor. This writ is a useful remedy, sometimes the only method, whereby the creditor can secure his debt. It is, therefore, to receive a liberal, not a rigorous regard.

The terms of the statute are abundantly sufficient to comprehend the case of a legacy, and ought so to be construed, unless there be something in the nature of the subject, or the mode of recovery, or the tribunal having jurisdiction over it, which may prevent. It is clear there are circumstances under which a legacy charged on land is recoverable in a court of common law. This position is fully sustained by the following cases: *Ewer v. Jones*, 2 Salk. 415; 2 Ld. Raym. 937; *Nicholson v. Sherman*, T. Raym. 23; 1 Siderf. 45; *Paschall v. Keterich*, 2 Dyer, 157, b; *Sambern v. Sambern*, 2 Bulst. 257; *Hawkes v. Saunders*, Cowp. 289, per Buller, justice; *Livingston v. Livingston*, 3 Johns. 189; *Beecker v. Beecker*, 7 Id. 99;¹ *Vanorden v. Vanorden*, 10 Id. 30.² On the other hand, two authorities only were cited on the argument at the bar, by the counsel of the defendant: 3 Cruise, 566, tit. Presumption, ch. 2, sec. 9, where the writer says: "A legacy given out of real property is only recoverable in a court of equity." Cruise refers to a single case in support of this position: 1 Vern. 256, where the question was not mentioned, and it does not even appear that the legacy was given out of real property. The other case was from 1 Desau. Ch. 588. The grounds on which that decision was made are not distinctly shown, and may have been something in the statute law or peculiar customs of the state of South Carolina. It is, however, not strong enough, if determined on general principles applicable elsewhere than in that state, to overcome a multitude of contrary cases. If, under no circumstances, a legacy, charged on land, were suable at common law, there would be some foundation for an objection to the return in question. But as such circumstances may exist, the objection is premature, and can only be raised with propriety, when a claim is made against the garnishee, by the regular course of procedure, calling on him for payment. If then such circumstances can not be shown, he may avail himself of the want of them, and successfully resist

1. *Beecker v. Beecker*, 7 Johns. 99 [5 Am. Dec. 246].

2. *Van Orden v. Van Orden*, 10 Johns. 30 [6 Am. Dec. 314].

the demand of the plaintiff in attachment. But it is said the garnishee may have no interest to resist the claim, and may omit to do so. And if he should, the debtor has no cause of complaint. If the debt on which the attachment is founded is just and honest, he can have no room for complaint that his property is applied to satisfy it. If not due, or unjust, he should dissolve the attachment, and defend himself against it. Again, it is said, the lands charged with the legacy may be swept away from the devisee for the payment of the debts of the testator, and if, therefore, he should pay the legacy under the attachment, he might be subjected to loss.

Against such an event the garnishee may readily protect himself; but ought any court to listen to such a complaint from the debtor? He can sustain no injury, and he ought not to be allowed to shelter the legacy, and abstract it from the reach of the law and of his creditors, under a peradventure that the devisee will not be wise enough to take care of himself.

2. In the second place, the present legacy was insisted to be not liable to attachment from analogy to a personal legacy; but there is a wide difference between the two cases, so that a barrier may properly exist in the one which is not to be found in the other. A personal legacy can not be demanded until a refunding bond, with two sufficient sureties, is tendered to the executor; nor be sued for until such bond, if refused on tender, is filed: Rev. Laws, 50, sec. 3. No such preliminary is required or necessary in the case of a legacy charged upon land. If, then, an executor was liable to be made garnishee in attachment, he might be subjected to make payment without that reasonable indemnity which the law has provided for him. Upon this ground mainly, as I have understood, for I was absent from indisposition when the decision was made, this court, in the case of *Thorn v. Wright*, quashed an attachment levied on a personal legacy in the hands of executors.

We are of opinion, therefore, that the objections to the return are not sustained, and that the motion to quash it ought to be overruled.

JOHNSON v. MARTINUS.

[4 HALSTED, 144.]

INDORSER OF A PROMISSORY NOTE INDORSED IN BLANK, will be permitted, in an action against him by the indorsee, to show that he indorsed merely to enable the plaintiff to collect the money of the drawer; and that it was agreed, when the indorsement was made, that he was not to be liable as indorser on the note.

ERROR to the common pleas. The opinion states the case.

Clark and Vroom, for the plaintiff in error.

Saxton, for the defendant.

By Court, EWING, C. J. The action in the court below was brought by Martinus against Johnson, upon a promissory note drawn by William E. Potts, in favor of Thomas I. Lowrance, or bearer, by him transferred, by delivery, to Johnson, and by him indorsed to Martinus. The indorsement was in blank, and was filled up in the common general form at the trial. After the plaintiff had closed his evidence, the defendant offered a witness to prove an agreement of the parties, Martinus and Johnson, at the time of the transfer, in relation to it; that, according to the agreement, Johnson was not to be considered liable to Martinus as indorser upon the note, and that his name was indorsed merely to enable the plaintiff to collect the money from the drawer. The evidence was overruled, and a verdict and judgment rendered for the plaintiff. The rejection of the evidence is assigned for the reversal of the judgment.

The objection to the testimony is founded on the rule which excludes parol evidence to impugn or alter a written contract; but this rule is wholly inapplicable in the case before us. An indorsement, while yet remaining in blank, and not filled up, is not a written instrument, nor entitled to its effect, protection or immunity. Before the note can be given in evidence to maintain an action, the indorsement must be filled up. A note indorsed in blank by the original payee may pass through many hands without further indorsement, and the last holder may fill up the blank with an indorsement to himself, and maintain an action against the drawer or indorser, although neither of them knows into whose hands it has found its way until called on for payment. Such, however, could not be the case, if, at the moment of the signature of the indorser, it is a complete written contract, and not, as the truth is, inchoate and imperfect, and with something yet to be done, before the right is fully and legally invested in the indorsee. The real nature of the transaction is an authority to fill up the indorsement according to the agreement of the parties, if an agreement is made, and, if none is made, with a common general indorsement, such as the law presumes the parties intend where no special agreement is made. The fair and *bona fide* possession of a note with a blank indorsement, furnishes presumptive evidence of authority to fill up the blank in a general, unlimited, unrestricted manner; but the evi-

dence is presumptive only, and leaves to the indorser the liberty, while it imposes on him the necessity, of proving the making of a different express stipulation. It is competent for a party in possession of a note thus indorsed, to fill up the indorsement, without other evidence of his right to do so than the mere possession. But it is competent for his immediate indorser to prove that in so doing he has abused his authority, and expressed the contract different from the stipulation and agreement of the parties. Such conduct on the part of the indorsee would be a direct fraud; and if the very perpetration of the fraud could close up the avenues of detection, and preclude inquiry, the rules of law and the courts of justice would merely call, instead of treating, fraud, as that all-destroying thing it is so universally and so justly described.

If a person, as is sometimes very imprudently done, give his name to a note with a blank left for the amount, but with an express agreement that it is to contain a sum not exceeding one thousand dollars, and it is filled by the payee with ten thousand dollars, in an action on this note by the payee, or by an indorsee with knowledge of the facts, no court would hesitate to receive evidence from a witness present at the signing of the note, of the actual agreement between the parties, and of the authority really given to the holder of the note. Such evidence was received in the case of *Ferris v. Saxton*, 1 South. 1, without objection either at the circuit or at the bar, as to the nature of the evidence, although the competency of the witness in that case, connected as he was with the event of the suit, was controverted and ultimately denied. The same principle is applicable to the question before us. The object was to show that the indorsement was filled up differently from the agreement of the parties; that it should have been so filled up as to enable the indorsee to recover the money from the drawer, but to save the indorser from any responsibility in case of his failure.

In the case of *Herrick v. Carman*, 10 Johns. 224, in a suit between the indorser and his immediate indorsee, the supreme court of New York said, that they were in one sense original parties, between whom the consideration of the contract might be inquired into, and held, evidence that the plaintiff, the indorsee, had given no consideration for the note, and was the mere agent of the payees, to be admissible, in order to show that no recourse could be had to the indorser. In *Barber v. Prentiss*, 6 Mass. 430, the drawer of a bill, in an action by an indorsee, was permitted to show, though the indorsement was

general, that the indorsee held the bill as the agent for the payees for collection only, and that the payees had requested him not to pay the indorsee; and these facts were held to furnish a good defense. The case of *Hill v. Ely*, 5 Serg. & R. 363 [9 Am. Dec. 376], was an action by the indorsee against the indorser, upon promissory notes, drawn by one Lamb, in favor of the defendant, and by him indorsed in blank, and the plaintiff proved on the trial that the notes were delivered to him by the indorser, in payment of coffee purchased of him by the indorser at the time of giving the notes. The defendant, the indorser, offered to prove by the testimony of a witness, that at the time of the indorsements, it was expressly agreed between the plaintiff and the defendant, that the defendant was not to be held responsible as an indorser for the payment of the notes, but that the indorsement was made for the purpose of enabling the plaintiff to collect the money from Lamb, the drawer. The supreme court of Pennsylvania held that the evidence was admissible. In *Mehelm v. Barnet*, in this court, Coxe, 86, the defendant had, "by general words in common form," as is said in the report, assigned to the plaintiff a sealed bill, on which the plaintiff had, after two years, sued and failed to recover, the maker being insolvent, and then brought the action against the assignor to recover back the consideration paid on the assignment. The defendant offered to prove it was expressly agreed, at the time of making the assignment, that the plaintiff should put it immediately in suit, and take it at his own risk. The plaintiff's counsel objected to the evidence respecting the terms of the assignment, contending that it was going out of the assignment, and varying the instrument, or the construction arising from it, as it stood; that if the defendant meant to put any terms, they should have been stated in the assignment; that after indorsing a note, generally, the indorser could not, when prosecuted by the indorsee, set up a special agreement to overthrow the general operation of the indorsement. Upon the trial, which was at bar, the evidence was held admissible, Kinsey, C. J., and Justice Smith being in favor of it, and Justice Chetwood opposed. The question again came before the court on a rule to show cause why the verdict, which was for the defendant, should not be set aside, and the whole court sustained the admissibility of the evidence.

What might have been the effect of the evidence offered in the present case, on the part of the defendant below, if it had

been received, when considered in connection with other evidence which is stated on the bill of exceptions, we are not at liberty to inquire or weigh. It is enough that testimony to which the party was legally entitled, has been rejected.

Let the judgment be reversed, and a *venire de novo* awarded.

WEED v. VAN HOUTEN.

[4 HALSTED, 189.]

NOTE PAYABLE AT A PARTICULAR PLACE.—It is not necessary, in an action on a promissory note made payable at a particular place, to aver or prove presentment at that place.

ACTION on a promissory note

Ogden, for the plaintiff.

Campbell, for the defendant.

By Court, EWING, C. J. The question presented in this cause is whether in an action by the payee of a promissory note, payable at a particular place, and not on demand, but at time, it is necessary to aver a presentment of the note and demand of payment by the holder at that place at the maturity of the note. It embraces also the necessity of such proof on the trial, because if such averment be essential to the declaration, the proof on the trial is indispensably required.

This subject has of late years undergone much discussion, and some contrariety of determination in the English courts. It has been held that in an action against the maker of a note made payable in the body of it at a particular place, there was no necessity of proof of a presentment at that place: *Wild v. Rennards*, 1 Campb. N. P. 425, note; *Nicholls v. Bowes*, 2 Id. 498. Where no place of payment was mentioned in the body of a note, but a memorandum was made in the margin or at the foot that it would be paid at a particular place, it has been held that the place of payment and presentment at that place need not be averred in the declaration: *Saunderson v. Judge*, 2 H. Bl. 509; nor proved on the trial: *Price v. Mitchell*, 4 Campb. 200; *Richards v. Milsington*, 1 Holt, N. P. 363, note. Again, it has been held that in an action on a note against the maker, where the place of payment was mentioned in the note, a presentment at such a place was a condition precedent and must be shown in the declaration: *Saunderson v. Bowes*, 14 East, 498¹; *Dickinson v. Bowes*, 16 Id. 108²; *Bowes v. Howe*, 5

1. 14 East, 500.

2. 16 East, 110.

Taun. 30. Where a bill of exchange was drawn without place of payment inserted in the body of it, but there was a special acceptance making it payable at a particular place, it was held by the court of king's bench, and by Lord Mansfield, Lord Ellenborough and Chief Justice Gibbs, at *nisi prius*, that a presentment at such place need not be averred: *Fenton v. Goundry*, 13 East, 459; *Smith v. Delafontaine*, cited by Lord Ellenborough in 13 East, 470; *Rowe v. Williams*, 1 Holt, 366, note; *Lyon v. Sundius*, 1 Campb. 423; *Head v. Sewell*, 1 Holt, 363. The contrary doctrine was held in the court of common pleas: *Ambrose v. Hopwood*, 2 Taun. 61; *Callaghan v. Aylett*, 3 Id. 397; *Gammon v. Schmoll*, 5 Id. 344. By recent decisions, however, as well of the king's bench as of the house of lords, the rule which now prevails is, that where the note or bill is made payable at a particular place, or where the latter is accepted payable at a particular place, a presentment at such place must be averred in the declaration and proved on the trial: *Cowie v. Halsall*, K. B. 1821, 4 Barn. & Ald. 197; *Rowe v. Young*, in the house of lords, 1820, 2 Brod. & Bing. 165. This was an action against the acceptor of a bill of exchange, accepted to be paid at a particular place, and the house of lords decided that an averment of presentment at that place was necessary in the declaration. It ought, however, to be remarked, and the case in this respect is one of rare occurrence, that the judgment was given against the opinions of a large majority, eight, of the common law judges, who held the averment to be unnecessary; the other four judges and the two chancery lawyers, Eldon and Redesdale, expressing opinions which were adopted by a majority of the house.

This subject has also undergone investigation in the American courts, and here a much greater uniformity of opinion and decision has prevailed. In *Foden v. Sharp*, 4 Johns. 183, which was an action by the payee against the acceptor of a bill of exchange accepted payable at a particular place, the supreme court of New York said: "The holder of a bill of exchange need not show a demand of payment of the acceptor, any more than of the maker of a note. It is the business of the acceptor to show that he was ready at the day and place appointed, but that no one came to receive the money, and that he was always afterwards ready to pay." The case of *Wolcott v. Vansantford*, 17 Johns. 248¹, was an action by the payee against the acceptor of an inland bill of exchange, drawn at five months, payable at

1. *Wolcott v. Van Santvoord*, 17 Johns. 248.

the Bank of Utica. A demurrer was taken to the declaration because the bill was made payable at the Bank of Utica, and there was no averment that it was presented there on the day it became payable. The court, after a very full and elaborate argument by Chief Justice Spencer, held that averment and proof of such presentment were unnecessary; "that the time and place of payment are merely modal, forming no essential part of the contract; that it is incumbent on the defendant, whether the payee was at the place at the time appointed or not, to show in his defense that he was there ready and willing to pay, and that the payee did not come, etc.; that the consequences of the absence of the payee under such circumstances, unless he makes a subsequent special demand and there be then a refusal, are merely that he must be content with receiving the sum originally payable; and if he sue without having made a special demand, he loses all claim to damages and costs." In the case of *Dodge v. Lanman*, in error in the superior court of Connecticut for Hartford county, in February term, 1806, cited in a note of Mr. Day, the American editor of *East's Reports*, 7 East, 388, it was held that in an action against the maker of a promissory note made payable at a particular place, there is no necessity of proving a presentment there for payment.

In *Carley v. Vance*, 17 Mass. 389, which was an action by the payee against the maker of a promissory note drawn payable at time, at a particular place in Boston, Wilde, justice, in delivering the opinion of the court, says: "The objection taken in this case to the declaration for want of an allegation of a demand at the time and place appointed for payment, can not, we think, be maintained. It is difficult to reconcile all the cases, but the weight of authority is opposed to the objection, and it has no foundation in principle." "In an action against the maker of a promissory note, or the acceptor of a bill of exchange, no good reason can be given for requiring the plaintiff to aver a demand. If the defendant was ready with his money at the time and place stipulated, he may plead it as a matter of defense."

In the case of *The Bank of the United States v. Smith*, 11 Wheat. 175, Justice Thompson, delivering the opinion of the supreme court of the United States, says: "This question, however, does not necessarily arise in the case now before the court, and we do not mean to be understood as expressing any decided opinion upon it, although we are strongly inclined to

think that as against the maker or acceptor of such a note or bill, no averment or proof of demand of payment at the place designated would be necessary."

After this review of the matter, I have no hesitation in expressing my entire concurrence in the American decisions, so far as is necessary for the present occasion, that on a promissory note made payable at a particular place in an action by the payee against the drawer, a special averment of presentment at that place is not necessary to the formality or validity of the declaration, nor is proof of it requisite, on the trial on a plea of *non-assumpsit*, to sustain the issue on the part of the plaintiff. This rule, I am satisfied, is most conformable to sound reason, most conducive to public convenience, best supported by the general principles and doctrines of the law, and most assimilated to the decisions which bear analogy, more or less directly, to the subject, as, for instance, on a bond, rent, and an award. An obligation with the condition for the payment of money at a particular place, does not require a special averment in the declaration, which merely alleges a non-payment by the defendant: *Shep. Touch.* 376 [390]; *Rastal*, 158, b, pl. 1. In declarations for rent payable on the land, or generally, an averment of demand on the land is unnecessary: 2 *Chit. Pl.* 173, 191; 1 *Lilly*, 130, 135, 141, 148, 155, 168; *Rastal*, 175 a, pl. 4; *Shep. Touch.* 376 [391]. On an award directing the payment of money at a particular day and place, the declaration need not assert a demand at that day and place: *Lambard v. Kingsford*, 1 *Lutw.* 207;¹ precedents in *Caldw. on Arbitr.* 332. I am aware that ingenuity has labored to show distinctions between these cases and the present, but they are specious, not solid. It is not, however, my design to enter into a full discussion of the matter. The luminous and elaborate arguments of those distinguished jurists of our own country, Spencer and Wilde, render it unnecessary, and the discussions and reasonings of the judges who dissented from the house of lords, in the case of *Rowe v. Young*, already mentioned, cannot be read without profit, nor, as I think, without conviction.

Let the demurrer be overruled.

This decision agrees with *Eastman v. Fifield*, 14 *Am. Dec.* 371. See note to that case, and authorities there cited. In *Mellon v. Croghan*, 15 *Id.* 163, the court reached a contrary conclusion.

1. *Lambard v. Kingsford*, 1 *Lutw.* 558.

PATTERSON v. TUCKER.

[4 HALSTED, 322.]

IF A SUBSCRIBING WITNESS TO AN INSTRUMENT DENY HIS SIGNATURE, it may be proved by other testimony.

ERROR to the common pleas of Somerset county. The opinion states the case.

Green, for the plaintiff in error.

Hamilton and Halsted, for the defendant.

By Court, EWING, C. J. Error is assigned in this case upon the matters contained in a bill of exceptions, and is said to consist in the overruling by the court below, of a receipt offered in evidence by the defendant there, the plaintiff in this court.

Tucker declared on a promissory note alleged to have been made by Patterson, and afterwards, and without payment by him, improperly canceled and destroyed. To prove his case he called and examined one Peter Welsh. Patterson, admitting that Tucker had been in his employ as a tanner, denied the making of a note, insisted that it was an article of agreement relative to the further employment of Tucker, which had not been fulfilled by Tucker, and sought to disprove the testimony of Welsh, and to show the writing signed by him to be merely an article of agreement, by circumstances and by antecedent declarations of Welsh himself. He also produced and gave in evidence a full release, executed by Tucker soon after the commencement of the action. He further alleged that long before the commencement of the action, he had settled with Tucker, and paid him all that was due to him, and offered in evidence a receipt bearing date the eleventh of October, 1817, after the date of the note, for twenty dollars, "in full for work done at tanning for said Patterson," subscribed Thomas (his X mark) Tucker, and bearing the name of Peter Welsh as a subscribing witness. Welsh, being asked whether the name thus subscribed was his handwriting, testified that he did not believe it was. On the part of Patterson a witness testified that Welsh taught school in the neighborhood, he had frequently seen him write, and seen frequently of his writing, and he thought the signature to the receipt was the handwriting of Welsh, but would not swear to it positively. The same witness also testified that on the day and before the release was executed, in a conversation, Tucker told him, on being asked if Patterson owed him anything, that Patterson owed him nothing, and again in

the presence of Patterson, Tucker said he owed him nothing; that they had a settlement, and that twenty dollars had been paid to him by Patterson on that settlement. Something was said about a receipt, and the witness understood from them that a receipt had been given. Afterwards the release was executed, which Tucker was told was to release the suit then commenced. Upon being offered one dollar, the consideration mentioned in it, he declined receiving it, saying that Patterson owed him nothing. The court of common pleas refused to permit the receipt to be given in evidence to the jury.

On the part of the defendant in error, it is insisted the overruling of the receipt was legal and proper, because, the subscribing witness having denied his signature, there was not sufficient evidence to warrant the court in submitting it to the jury.

The general rule of evidence requires the production and examination of the subscribing witness whenever there appears one on the face of the instrument. But when the witness can not be had, the reason of his absence being satisfactorily explained; or when, if had, legal impediments to his examination exist; or when, if present and examined, he is unable or unwilling to prove the execution of the instrument, as if he denies his attestation, or, in other words, that he was present at the execution, and subscribed as a witness, or if he admit his subscription, but deny that he saw the instrument executed, other evidence will then be received. The law prudently calls for the testimony of the witness, but is too wise and too conscious of human imperfection and frailty, to rest its confidence, to limit its inquiry, and to conclude the rights of the parties solely by the recollection or forgetfulness, the integrity or waywardness of any witness. In *Dayrell v. Glascock*, Skinner, 413, it was ruled that if there are three subscribing witnesses to a will, and on the trial one of them would not swear he saw the testator seal and publish it as his will, yet if it be proved to be his hand, and that he set it as a witness to the will, it is sufficient. In *Blurton v. Toon*, Skinner, 639, an action of debt on an obligation and *non est factum* pleaded, one of the subscribing witnesses was dead, and the other being sworn said his hand was subscribed as a witness, but that he did not see the obligation sealed and delivered; upon evidence of the handwriting of the other witness, the obligation was held to be sufficiently proved.

The case of *Pyke v. Badmarring*, cited in Andrews, 236, and 2 Str. 1096, was an ejectment tried in the king's bench at bar upon a will; "and every one of the three subscribing witnesses

to the will," says Andrews, "denying the execution, there was an endeavor on the side of the devisees to maintain the will without calling any of them; but the court insisted upon hearing these first, and they all denied their hands; whereupon it was urged that the party could not call other persons in opposition to his own witnesses. But the court admitted other evidence, for that a man shall not lose his cause through the iniquity of his witness." And Strange says the will was supported. In *Goodtill v. Clayton*, 4 Burr. 2224, Justice Yeates said there are cases where one witness has supported a will by swearing that the other two attested, though those other two have denied it; and Lord Mansfield said he had several cases, both upon bonds and wills, where the attestation of witnesses had been supported by the evidence of the other witnesses, against that of the attesting witnesses who denied their own attestation; and in *Abbott v. Plumbe*, Doug. 216, he held that, though the subscribing witness deny the deed, you may call other witnesses to prove it, and said that it had often been done. In 10 Ves. 174, the master of the rolls said: "If there is the attestation, and he confesses himself to be the attesting witness, *prima facie*, the presumption is that what he has attested has taken place in his presence; if he denies that, other evidence is admissible, from circumstances, as where there were no attesting witnesses, or the person whose attestation appears does not exist, proof of the handwriting is sufficient to enable a jury to presume in such a case that sealing and delivery took place, though the handwriting alone does not of itself import sealing and delivering." In *Fitzgerald v. Elsee*, 2 Campb. 635, the subscribing witness to an indenture of apprenticeship having testified that he did not see it executed, it was objected that it must be taken never to have been executed with due formality; but Lawrence, J., said it was then to be treated as if there were no attesting witness, and he admitted other proof of its execution. In *Lemon v. Dean*, Id. 636, it was held that if the subscribing witness can not prove a note, by reason of not having seen it drawn, it may be proved by other witnesses. In *Rex v. Harringworth*, 4 Mau. & Sel. 353, it was said by Lord Ellenborough: "A party who would prove the execution of any instrument that is attested must lay the ground work by calling the subscribing witness to prove it, if he can be produced and is capable of being examined. His testimony, indeed, is not conclusive, for he may be of such a description as to be undeserving of credit, and then the party may go on to prove him such, and may call other witnesses to prove the exe-

cution." In *Talbot v. Hodson*, 7 Taun. 251, by Gibbs, C. J. : "Where an attesting witness has denied all knowledge of the matter, the cause stands as though there were no attesting witness, and other evidence may be admitted. Here the attesting witness who attests the sealing and delivery says she saw nothing of it; and the attesting witness being thus got rid of, it is open for the jury to consider of the effect of any evidence that may be adduced." In *Sigfried v. Levan*, 6 Serg. & R. 310 [9 Am. Dec. 427], Justice Duncan, delivering the opinion of the court, said: "The signature, sealing, and delivery are matters of fact to be tried by the jurors. If the subscribing witness denies the attestation, or is unable or unwilling to prove the execution of the deed, collateral circumstantial evidence, proof of handwriting of the attesting witness, or acknowledgment are admissible. Where there is proof of the handwriting of the attesting witness this is evidence of all he professed to attest by his signature, the sealing and delivery of the bond." In *Pearson v. Wightman*, 1 Const. Ct. (S. C.) 310 [12 Am. Dec. 636], Justice Cheves, delivering the opinion of the court, says: "Where subscribing witnesses can not be produced, or where, when produced, they deny their signatures, or otherwise fail to prove the due execution of the will, circumstantial evidence may be adduced to supply this deficiency. Of this description of evidence, proof of the handwriting of the subscribing witnesses is the most direct and usual." And speaking of one of the subscribing witnesses who, like Welsh in the present case, did not positively deny the name to be his writing, but doubted it, he says: "I then think the testimony of this witness himself would have authorized the verdict of the jury as it regards him. But the testimony of the witness already mentioned proves satisfactorily his handwriting;" and he thought, therefore, that the verdict, as it regarded him, ought to stand.

The case of *Phipps v. Parker*, 1 Campb. 412, was cited and relied on by the counsel of the defendant in error. In that case, which was an action for words, it became necessary to prove a policy of insurance, which had the names of two of the directors of the Sun Fire Insurance office affixed to it, and purported to be executed by them in the presence of I. S., as attesting witness. I. S. swore it had not been executed in his presence by either of the gentlemen whose names appeared at the bottom of it. It was then proposed to prove the execution of the policy, by evidence of the handwriting of the directors who had signed it, and by showing that they had subsequently

acknowledged it to have been their deed. Lord Ellenborough is reported to have said: "The policy purports to have been executed in the presence of the witness. I must, therefore, take it to have been executed in his presence, if it was executed at all. If it was not executed in his presence, the conclusion of law is, that it was never executed as a deed, although it may have been signed by these two directors. Nor can I admit evidence of their acknowledgment, since the attestation points out the specific mode in which the execution is to be proved. Being issued as an attested deed, and now certainly appearing not to have been executed in the presence of the attesting witness, I think it must be considered as invalid." Of this case it may be said it is entitled to no weight. It has either been misreported, or it proves that a very able and learned judge may err. For it is inconsistent with a series of well-considered adjudications, and Justice Park, speaking of it in 7 Taun. 251, says: "The same high authority which decided *Phipps v. Parker*, has since held otherwise," alluding, probably, to *Rex v. Harringworth*, already mentioned. The admissibility of other evidence, then, upon the denial or failure of proof by the subscribing witness, is abundantly shown. But it was insisted, on the argument at the bar, that when the subscribing witness denies his handwriting, the mode of proof is confined to the handwriting of the party making the instrument, and that no case is to be found where proof of the handwriting of the witness was received or deemed sufficient. Now it is manifest that if such a rule exist, it must utterly exclude all proof of an instrument to which a party, unable to write, had made his mark. The observation that no such case is to be found, appears from the books already referred to, evidently too broad. But the law is not a mere collection of precedents. It is a science of principles; and he must be a very timid judge who is fearful to tread where he has the solid ground of principle to support him, because he can not see the print of the footsteps of some predecessor.

In *Newbold v. Lamb*, 2 South. 450, it was recognized as a settled principle, and not now to be questioned, that proof of the death and of the handwriting of a subscribing witness to a deed, is sufficient to pass the deed to the consideration of the jury. And it has been held that when the witness is out of the jurisdiction of the court: 12 Mod. 607; 2 East, 250; 4 Johns. 461; 5 Cranch, 13; or become blind: 1 Lord Raym. 734; or insane: 3 Camp. 283; or convicted of an infamous crime, as forgery: 2 Str. 833; or has become interested: 5 T. R. 371; 1 Str. 346;

6 Binney, 45; or, upon due and strict inquiry, can not be found: 12 Mod. 607; 5 Cranch, 13, proof of the handwriting of the attesting witness is *prima facie* evidence of the execution of the instrument. Now it is said the signature of the attesting witness, when proved, is evidence of everything on the face of the instrument, on the principle that what a man has attested under his hand is true; or that the witness would not have subscribed his name in attestation of that which did not take place. If, then, such be the rule in these cases, and such the principle on which it is founded, the very same presumption must arise, and, of course, the same rule exist, where the handwriting is satisfactorily proved to be that of the witness, although from imperfection or defect of memory, he may have forgotten it; or from undue influence or bad motives, he may willfully and wickedly deny it. In such case, a greater quantity of evidence to prove his handwriting may be demanded, but when the fact is established, the consequence must be the same.

Another instance may strongly illustrate and support my argument. In the case of *Gaston v. Mason*, Coxe, 10, where the witness admitted his signature, but had no recollection of the execution of the instrument, the same presumption had its effect, and the instrument was held sufficiently proved to go to the jury. It is true, where the witness admits his signature, but expressly testifies that he did not in fact see the execution, the presumption is repelled and resort is had to proof of the handwriting of the party, or to collateral proof and the evidence of circumstances. And in the present case it will be recollected, beside the testimony of Nevius as to the handwriting, were the release, and the admission of Tucker respecting the settlement and receipt, and his repeated declarations that Patterson owed him nothing. Here, then, was some proof of the handwriting of the witness, and independent thereof some evidence of circumstances tending to produce a belief that the contents of the receipt were true. Whether these matters were such as should have satisfied the jury that the receipt was genuine, it is not necessary to examine. It is enough that they were sufficient fairly to raise a question of fact, which ought to have been submitted to the jury, for their determination. Where there is no evidence of the due execution of an instrument, it is the duty of the court to reject it. Where there is some evidence the opinion of the jury ought to be taken. The remarks of Justice Duncan, in *Sigfried v. Levan*, 9 Am. Dec. 427, a case not dissimilar to the present in many circumstances, are

very appropriate. "The mistake arises from supposing that the court, in suffering the deed to go in evidence to the jury, decide the issue. Nothing can be more unfounded. All that is done by the court in admitting the deed as evidence is, that if the execution of the deed is proved by the subscribing witness, the party has made out a *prima facie* case, not a conclusive one; or in cases where recourse is had to the secondary evidence, the collateral proof is such that a jury might presume the execution, and then these facts are submitted to the jury to exercise their own judgment, to draw their own conclusions, of sealing and delivery. The facts and circumstances were of that nature that the bond should have been received in evidence, open to all evidence that might be adduced to lessen the weight of these facts and circumstances, and in withholding the bond from the jury, the court decided that issue of fact which could only be decided by the jury."

In opposition to the admissibility of the receipt it was further insisted, upon the argument at the bar, that the court might have rejected it; not that they actually did so, for their reason is not stated on the bill of exceptions, because irrelevant and inapplicable to the note. But this conclusion can find no appearance of support except in a partial view of the circumstances of the case. The receipt, it is said, does not mention the note, and is in full for tanning done for the defendant. It must, however, be recollected that whether a note had been given or had existence, was a subject of controversy. And the purpose of the defendant was as well to repel the allegation that he had made such a note, as also to show by the release, and the receipt, and the declarations and admissions of the plaintiff, that whatever might have been due to him at any time, had actually and fully been paid. In this point of view a receipt given some months after the alleged date of the note, purporting to be in full for work, and more especially if, as may be fairly inferred from the matters set forth in the bill of exceptions, no tanning had been done by the plaintiff for the defendant in the intermediate period, was clearly relevant and competent.

Let the judgment be reversed.

SHARP v. TEESE.

[4 HALSTED, 352.]

NOTE GIVEN BY INSOLVENT DEBTOR TO TWO OF HIS CREDITORS, in consideration of their withdrawing opposition to his discharge, is void.

ATTEMPT TO CONTRAVENE THE POLICY OF A PUBLIC STATUTE is illegal, whether expressly prohibited by such statute or not.

CERTIORARI. The opinion states the case.

Gifford, for the plaintiffs.

Pennington, for the defendant.

By Court, EWING, C. J. This case comes before us by *certiorari* to the court of common pleas of the county of Essex. The plaintiffs prosecuted a suit in the court for the trial of small causes, on a promissory note given to them by the defendant. Judgment having been rendered there against them, they appealed, and, on the trial of the appeal, the court of common pleas also rendered judgment for the defendant. From a state of the case agreed on by the parties, it appears that Teese was indebted to the Sharps; that he applied to the common pleas of Essex in September, 1823, for his discharge under the insolvent law; that the Sharps opposed his discharge; that Teese offered, if they would withdraw their opposition, he would pay them down about one half of their debt, and give them his note for the balance, to be dated the next day after the discharge, payable in one year. To this they agreed; the note now in question was given that day, dated the subsequent. The sum to be paid down was on that day secured to be paid. The opposition was withdrawn, the defendant was discharged, and the next day the money secured to be paid down was actually paid. The attorneys of both parties were present when the arrangement was made.

In the discussion of this case at the bar, two questions were proposed: 1. What was the consideration of the note? 2. Was the consideration legal?

1. On the part of the plaintiffs, it was insisted that the antecedent debt, not the withdrawing of the opposition, was the consideration; but the converse of this proposition is most clearly the truth. The consideration of a contract, says Blackstone, is the reason which moves the contracting party to enter into it. Now, the antecedent debt, or the existence of that debt, was not the reason which induced Teese to give this note. Without other motive he would not have given it. Had no op-

position been made, or, when made, had it not been withdrawn, this note would not have existed. The language and conduct of Teese are not, I owe you a debt, and I will, therefore, give you a note to show or to secure it; but, withdraw your opposition, and I will, therefore, give the note. The reason which induced Teese to give, and the plaintiffs to accept the note, was, beyond all doubt, the withdrawing of the opposition, which, agreeably to the provision of the insolvent law, they had interposed to his application for discharge.

2. Was such consideration legal? The policy of our insolvent laws is, that a full and fair disclosure and surrender of the property of the debtor shall be obtained; that on such disclosure and surrender he shall be, without further impediment, liberated from confinement; and that all the creditors shall be placed on an equal footing without preference, except where liens exist, and shall equally partake of the property, which, by such disclosure and surrender, is subjected to the control and disposal of the law. Any transaction or arrangement which tends to defeat either of these purposes, is inconsistent with the policy of the law. The attempt to contravene the policy of a public statute is illegal.

Nor is it necessary to render it so that the statute should contain an express prohibition of such attempt. It always contains an implied prohibition; and to such attempt the principles of the common law are invariably and deadly hostile, not always by an interference between the parties themselves, or by enabling the one to recall from the other, when *in pari delicto*, what may have been obtained; but by at all times refusing the aid of the law to carry it into effect, or enforce any contract which may be the result of such intended contravention. The giving of the note, and the arrangement made in the present case, are, on almost every point, inconsistent with the policy of the insolvent law: 1. It places one creditor, perhaps in no wise more meritorious than the rest, on much more favorable ground. One half his debt, probably much more than the dividend of the others, was paid him in money, and this note, free, if valid, from the effect of the discharge, was given for the residue; 2. It serves to stifle inquiry, and to protect fraud and concealment from successful disclosure and development. The just presumption is that the debtor had reason to fear the investigation resulting from the opposition to him. Conscious of integrity, he would have sought, not shrunk from scrutiny; he would have boldly defied it, not purchased exemption at a heavy charge.

Either, then, fraud existed, which the giving of the note forever hid from detection, or if no fraud tainted the conduct of the debtor, and the creditor had not, as his opposition avowed, some grounds of censure, then was the note obtained by oppression, extortion, and false and fraudulent pretensions, and in either event ought to be condemned. In the third place, to sustain a note or contract under such circumstances is to encourage causeless opposition, to raise up illusory barriers, and to impede the honest but unfortunate debtor by greater difficulties than the law ever designed. He may, perhaps, oftentimes be induced to bribe into silence a powerful and wealthy creditor, who by a show of opposition has no other design than to obtain an illegal preference. In mercy to the debtor himself, then, the law will protect him from such jeopardy. These principles are sanctioned by a number of cases, to which it may suffice to give a general reference, without a particular review in detail: *Jackson v. Duchaire*, 3 T. R. 551; *Cockshott v. Bennett*, 2 Id. 765; *Nerot v. Wallace*, 3 Id. 17; *Jackson v. Lomas*, 4 Id. 170, per Buller; *Blackford v. Preston*, 8 Id. 93, per Ashurst & Lawrence; *Smith v. Bromley*, Doug. 696, note; *Holland v. Palmer*, 1 Bos. & P. 95, per Eyre, C. J.; *Leicester v. Rose*, 4 East, 380; 1 Leon. 180; Yelv. 197; 1 Atk. 352; Cowp. 39; *Callagan v. Hallett*, 1 Cai. 104; *Payne v. Eden*, 3 Id. 213; *Waite v. Harper*, 2 Johns. 386; *Bruce v. Lee*, 4 Id. 410; *Yeomans v. Chatterton*, 9 Id. 295 [6 Am. Dec. 277]; *Wiggin v. Bush*, 12 Id. 306 [7 Am. Dec. 324]; *Tuxbury v. Miller*, 19 Id. 311; *Sterling v. Sinnickson*, 2 South. 756. Of some of these cases, when cited on the argument at the bar, it was said they arose on the bankrupt laws in England, and the statutes in New York, whereby both the person and the debt were discharged. But these cases are worthy of respect and attention, not more for their peculiar circumstances than as illustrations of great principles of the common law, principles as powerfully applicable to a statute concerning insolvents as to a statute respecting bankrupts. For to contravene the policy of a statute, to defeat by artful contrivance the just aim of legislative wisdom, is equally to be reprehended, whether the statute relates to those who are, or who are not traders; whether it discharges the person only, or both debt and person. To the remark that in the English bankrupt system there is an express provision, by Stat. 5 Geo. II., ch. 30, sec. 11, which makes void every security for the payment of any debt due before the party became bankrupt, given as a consideration to a creditor to sign his certificate, the observation of Lord

Mansfield, in *Smith v. Bromley*, is a sufficient answer: "The taking money for signing certificates is either an oppression on the bankrupt and his family, or a fraud on his other creditors. It was a wrong thing in itself before any provision was made against it by statute."

With respect to some of the New York cases, it was remarked that under one act the debtor, and under another the creditors, must make oath that no preference had been given. But the prescribing of this oath is only a method of preventing the preference which the act seeks to deny, and of securing the equality which is one of its leading objects. It has nothing to do with the effect of such preference when given or attempted. It was further objected by the counsel of the plaintiffs, that under the New York insolvent laws, the sanction of a certain number and value of the creditors must be obtained by making application for or assenting to the discharge, and that here any one creditor may make opposition, so that no one is here, as there, dependent on another. But in the case of *Payne v. Eden*, the note declared void was given to the last of the petitioning creditors, who signed after there was a sufficiency in number and value to exonerate the debtor; and in the cases of *Waite v. Harper*, *Bruce v. Lee*, *Wiggin v. Bush*, and *Tuxbury v. Miller*, the withdrawing of the opposition merely, and not the signing of the petition, was the consideration.

The consideration of the note in question, or the reason which moved Teese to give, and the plaintiffs to accept it, was, in my opinion, illegal; the note was void, and the judgment of the court of common pleas was right.

It may not be improper to observe that this opinion does not in the slightest degree conflict with the case of *Hendricks v. Mount & Crane*, 2 South. 738 [8 Am. Dec. 623], where the purpose of the sale of the goods was to satisfy or secure an existing debt; where, in the opinion of the court, the bill of sale had been made before the petition under the insolvent act had been presented; and where certainly no opposition had been made or was withdrawn. Nor does the opinion in any measure interfere with the settled and just principle that an insolvent or bankrupt may, after his discharge, and when free from restraint, make a valid promise to pay an old debt; and that the old debt is so due in conscience, notwithstanding the discharge, as to afford a sufficient and legal consideration for the promise.

Let the judgment be affirmed.

STATE v. JONES.

[4 HALSTED, 357.]

AMENDMENT OF CAPTION TO INDICTMENT.—The caption to an indictment may be amended in the supreme court, after its removal thereto by *certiorari*, upon proof of the necessary facts; or it may be sent back to the lower court, there to be amended from the record.

ALLEGATION OF THE PROSECUTING ATTORNEY that the record of the lower court contains sufficient materials from which to amend the caption to an indictment, warrants the supreme court in sending it to such court for amendment.

CAPTION TO INDICTMENT NEED NOT SHOW that the members of the grand jury were summoned and returned as such.

OFFENSE COMMITTED IN A COUNTY BEFORE ITS DIVISION is indictable in the new county embracing that portion of the old one in which such offense was committed.

IN INDICTMENT FOR FORGERY IT IS NOT NECESSARY TO ALLEGE that the person whose name was forged was actually defrauded thereby; it is sufficient to show that he might have been defrauded had the forgery succeeded.

CERTIORARI. An indictment for forgery was found by the grand jury of Warren county, against the defendant, describing him as late of the township of Hardwick, in the county of Warren, and charging that he did, at the township of Mansfield, the said township of Mansfield then being in the county of Sussex, and now being in the county of Warren aforesaid, feloniously utter and publish as true a certain false, forged, and counterfeited acquittance and receipt for money, a copy of which was therein set forth, with intent to defraud, and at the time knowing the same to be false, forged, and counterfeited. The caption to the indictment stated that, by the oath of certain persons named therein, “good and lawful men of the said county, sworn, and charged to inquire for the state in and for the body of said county, it is presented.” And in the body of the indictment it was stated that they, “upon their respective oath and affirmation, present, those who were affirmed alleging themselves to be conscientiously scrupulous of taking an oath.”

To this indictment the defendant pleaded not guilty, and by *certiorari* removed the indictment into the supreme court. The clerk of the court of oyer and terminer sent to the supreme court a copy of the proceedings and annexed thereto a certificate “that the foregoing is a true copy from the minutes and files of said court upon the said indictment.” After the return of the writ the defendant, by his counsel, obtained leave of the court to

withdraw his plea of not guilty, and filed exceptions to the said indictment and proceedings.

At the same term, on the motion of the prosecuting attorney of the county of Warren, and on his allegation that the records and files of the court of oyer and terminer contained all the materials for amendment, the court ordered that the *certiorari* and return in this cause be remitted to the said court of oyer and terminer of the county of Warren, to the end that the caption returned with the said *certiorari* may be amended, according to the fact, in the two following particulars: 1. That the said caption may set forth whether any, and which, of the grand jurors mentioned in the said caption were duly affirmed, and whether, prior to such affirmation, they declared themselves conscientiously scrupulous of taking an oath; 2. Whether said grand inquest was then and there sworn and affirmed. This order was opposed by defendant's counsel.

The *certiorari* was again returned to a subsequent term with a copy of the indictment annexed, the caption to which showed the names of the grand jurors who were affirmed, and the names of those who were sworn, and that they were then and there sworn and affirmed. There was also annexed a copy of the rule of the court of oyer and terminer ordering the amendment. The county clerk of Warren certified at the foot of the schedule that "the foregoing is a true copy from the minutes and files of said court upon said indictment." In another schedule, containing a copy of the former rule of the supreme court, is an answer signed by said clerk "by order of the court," in these words: "In obedience to the command of this rule we herewith send annexed a new caption to the indictment herein named to the honorable the justices of the supreme court of judicature of the state of New Jersey."

Scudder, for the defendant, objected to the return and insisted that it could not be considered as any return made to the court concerning the said indictment. 1. Because the court of oyer and terminer of the county of Warren ordered its clerk to amend the caption, whether he had anything to amend by or not; and because the return annexed to the order does not state that there was anything to amend by, or that anything had been omitted in the first return; nor does the return amend the caption; 2. Because by the return it appears that the clerk made a new caption, and did not amend the caption returned with the *certiorari*; 3. Because a new caption can not be made, nor the caption be

amended except to correspond with the original: 1 Chit. Crim. Law, 335; 4 East, 175.

He also argued the exceptions to the indictment. At the time when the offense is charged to have been committed there was no such township or county as the township of Hardwick in the county of Warren, for the county of Sussex had not then been divided; therefore, there could be no such person or place as the indictment would give the court to understand. It appears from the indictment that the supposed offense was committed in the county of Sussex, and the indictment is found in the county of Warren. This can not be done without legislative provision, and no such provision has been made. It is enough for the defendant to say that the offense was not committed in Warren. That the offense was committed at a place within the present county of Warren is nothing, for the county then had no existence and no offense could be committed within its jurisdiction. Where a man was wounded in one county and died in another, by statute, the offender may be indicted in either county, but this could not be done without the aid of the statute, otherwise there would be no necessity for passing it: Stat. 2 and 3, Edw. 6, ch. 24; 2 Geo. 2, ch. 21; Rev. Laws, N. J. 297; *Wilson v. Clark*, 1 Esp. N. P. 273. All courts are confined to their particular jurisdictions: 3 Jac. Law Dic. 564; 3 Lill. Abr. 315. Jurisdiction is not presumed where it does not appear: 2 Hawk. C. 10; 3 Lill. Abr. 151. It ought to appear that the persons composing a grand jury were summoned and returned as such.

Vroom, contra. The township of Mansfield, where the crime is alleged to have been committed, is now in the county of Warren. The crime is an offense against the state, to be tried in the proper county, that is, in the county having jurisdiction of the place where it was committed. That was at the time the county of Sussex; but by the division it is now the county of Warren. Of necessity and right the courts in the new county have power to try offenses, and all other local matters, the same as those of the old county would have done, had there been no division. If the offense was committed within the territory of Warren the right of trial and punishment necessarily follow. The statutes relative to crimes not committed in any one county present no analogy, for here the crime was committed in one place. The residence of the defendant refers to the time of finding the bill, not of the commission of the offense.

By Court, EWING, C. J. In this case exceptions are taken to an indictment, and the caption accompanying it, which was

found at the court of oyer and terminer of the county of Warren, in June, 1826, and removed into this court by *certiorari*, sued out at the instance of the defendant.

Briefs have been submitted to us by the respective counsel. Some of the objections contained in the brief on the part of the defendant, relate to an amendment of the caption, and ought not now to have been raised. The points involved in them have been, in substance, twice decided by this court in this cause. To urge them again was not regular, and they might with perfect propriety be passed without further remark. But our wish is not only to do right, but to give satisfaction; not merely to decide causes, but to show forth the reasons and grounds of our determinations. We shall, therefore, examine these objections somewhat at large.

The caption of an indictment is no part of the indictment itself. It is not presented by, nor does it receive the sanction of, the grand jury, nor the signature of their foreman. It is a history of the proceedings previous to the finding of the indictment; and sets forth the style of the court; the time and place of its session; by whom held, and their title and authority; by whom they are to inquire; the names of the grand jurors; their qualifications; whether sworn or affirmed, and who of them are sworn and who affirmed, and if affirmed the reason of it; that they allege themselves to be conscientiously scrupulous of taking an oath; and then follows their presentment. It is drawn up by the prosecuting attorney, or by the clerk of the court.

Many reasons evince the propriety of drawing up and filing the caption at the term when the indictment is found, but however commendable, it is not always so done, either in the English courts or in our practice, but is oftentimes postponed until after judgment, when the record is to be made up, or until, a *certiorari* being presented, it becomes necessary, in order that the whole proceedings may be duly certified according to the exigency of the writ to the supreme court. From this view of the nature of a caption, its capability of amendment, and the reason and propriety of it, may be readily perceived. Even when returned into the court of king's bench, on *certiorari*, the schedule, for so this part of the return is in some of the books called, being, according to them, the materials from which the caption is to be drawn, and the caption itself, after that appellation is, according to all of them, properly assumed, have always been deemed to be amendable. For a time, indeed, it was held that an amendment could only be made in the term of the return of

the writ, and not at any subsequent term, as will be seen from 2 Hale P. C. 168, and by the cases of *Rex v. Brandon*, Comb. 70; *Faulkner's case*, 1 Saund. 249; *Regina v. Hoskins*, 2 Ld. Raym. 968; *Regina v. Franklyn*, Id. 1038; *Rex v. Glover*, 1 Sid. 259.¹ But in the time of Lord Mansfield the subject underwent a thorough investigation, and it was found that the caption was not only liable to amendment in the term of its return, but afterwards, and even after verdict. A recurrence to the case of *Rex v. Atkinson*, a report of which is given by Sergeant Williams, in his note to 1 Saund. 249, will be useful from its analogy to the case before us, and because, having been affirmed in the house of lords on a writ of error, it is considered to have settled the law on this subject in the courts of Westminster.

Atkinson was indicted for perjury at the oyer and terminer of the county of Middlesex. The indictment was removed at his instance by *certiorari* into the court of king's bench. At a subsequent term, and after the defendant had been tried and found guilty, his counsel moved in arrest of judgment on two objections to the caption: First, because from the caption it appeared the indictment was found before justices of the peace, who had no jurisdiction of perjury at common law. Second, because the names of the grand jurors did not appear upon the record; for, in making up the entry-roll in the treasury, and the *nisi prius* record in the court of king's bench, the officer had not only followed the caption as returned in respect to the style of the court, but had omitted the names of the grand jurors. Afterwards, in the same term, the attorney-general moved to amend the return to the *certiorari*, by inserting the commission of oyer and terminer, and the names of the justices before whom the indictment was found, according to the fact appearing by the said commission and the minutes of the court; in other words, to amend, so as to cause it to appear that the indictment had been found, as in truth it was, before a court of oyer and terminer having jurisdiction, and not before a court of quarter sessions of the peace.

On this application, a rule to show cause was made, a copy of which is to be found in a note in 4 East, 175, the material part of which is as follows: "Upon reading the affidavits of J. B. and J. P., and also on reading the commission of oyer and terminer for the county of Middlesex, and the minutes of the court before which the indictment in this case was found, now produced and shown to this court, it is ordered that Wednesday

1. *Roy v. Glover*, 1 Sid. 259,

next be given to the defendant to show cause why the return to the writ of *certiorari* should not be amended by inserting therein the commission of oyer and terminer, by virtue of which, and also the names of the justices by whom, the above-mentioned court was holden, at the time when the said indictment was found, according to the truth of the fact appearing by the said commission and minutes above mentioned; and also why the caption of the said indictment should not be thereby amended, and made agreeable to the said return when so amended as aforesaid, and also that the defendant shall, upon the same day, show cause why the aforesaid caption should not be likewise amended, by inserting therein the names of the jurors by whom the indictment was found, as stated in the return already made to the said *certiorari*."

After argument, in which the authorities to be found in the books were examined, the rule to show cause in both branches was made absolute, the caption contained in the return was amended, and another rule was also entered to this effect: "That the entry-roll in the treasury, and also the record of *nisi prius*, be amended as to the caption of the indictment, by making the same agree with the amended caption lately returned into this court by the clerk of the peace of the county of Middlesex, and filed in this court." Lord Mansfield, in delivering the opinion of the court, said, among other things: "The doubt is, whether the authority is properly set out, and, perhaps, without prejudice to the question, it would be defective. Who are the commissioners of oyer and terminer? The return says, four, of whom Sheppard is the last; but not four only; it says, and others. Then, does there remain in the original minutes enough to amend by? Beyond a possibility of doubt, I think there does. There appear the names of the jurors sworn under the commission of oyer and terminer. There appear the names of the justices, whom the clerk swears were there. What, then, is to impeach it? Nothing. No oath that any of them was not there. Therefore, if, by law, a return to a *certiorari* can be amended after the term in which the indictment comes in, there can be no doubt but these circumstances will be sufficient to amend it." He then, after a review of the authorities on this point, says: "We think these authorities alone, not contradicted by any determination whatever, would bind us to make the amendment prayed. The application is not to alter any part of the charge; not to vary the verdict or finding of the jury; it is not to cure any original defect; but to make the re-

turn of the proceedings in the inferior court conformable to what they really have been, and to make that return speak truth, which now, by mere blunder of the officer, is contended to contain a falsehood."

This subject came again before the court of king's bench, in the case of *Rex v. Darley*, 4 East, 174. An indictment for assault and battery was found in the court of general quarter sessions of the peace of the county of Sussex, was removed into the court of king's bench by *certiorari*, and upon trial at the assizes, the defendant was found guilty. Afterwards, the counsel of the prosecutor obtained a rule to show cause "why, upon reading the affidavit of W. E., and a parchment writing thereto annexed, and the minutes of the court before which the indictment in this prosecution was found, now produced and shown to this court, the return to the writ of *certiorari* issued by this court at the instance of the defendant, should not be amended by inserting, in the return of the caption, the time when the general quarter sessions of the peace at which the said indictment was found was holden, and the names of the justices by whom the said session was holden, and the names of the jurors by whom the same was found, according to the truth of the fact, and why the entry roll in the treasury, and also the record of *nisi prius*, should not be amended as to the caption of the indictment, by making the same agree with the caption when so amended." Upon making this rule, it appears from the report that the clerk of the court of quarter sessions attended with the book of minutes of that court, that it might be inspected. On a subsequent day, that eminent lawyer, Erskine, who was the defendant's counsel, admitted that he could not oppose the amendment prayed, and the rule was made absolute.

In the case of John Bell, indicted for murder, upon motion in arrest of judgment for a defect of the caption, President Addison, of Pennsylvania, held that the caption was amendable; and that it was to be considered not so much an original as a formal transcript of other materials in the records, or during the term, in the breast of the court, and when occasion requires, made up in form by the clerk, from the materials necessarily before him: Addison, 180.

In the case under our examination, upon the return originally made to the writ of *certiorari*, it appeared in the caption that "by the oath of D. S., etc. [naming the grand jurors], good and lawful men of the said county, sworn and charged to inquire, etc., it is presented," etc. And in the body of the indictment

it is thus: "Upon their respective oath and affirmation present, those who were affirmed alleging themselves to be conscientiously scrupulous of taking an oath, that," etc. On the motion of the prosecuting attorney of the county of Warren, we made a rule "that the *certiorari* and return be remitted to the court of oyer and terminer of the county of Warren, to the end that the caption returned with the *certiorari* may be amended according to the fact, in the two following particulars, to wit, that the said caption may set forth whether any, and which, of the grand jurors mentioned in the said caption were duly affirmed, and whether, prior to such affirmation, they declared themselves conscientiously scrupulous of taking an oath; and second, whether the grand inquest was then and there sworn and affirmed." At a subsequent term the *certiorari* was sent back to us, and the return contains, among other things, a caption amended in the particulars mentioned in the rule, and stating that "by the oaths of D. S." and others, naming them, "and by the solemn affirmations of C. R. and S. L., the said C. R. and S. L. alleging themselves to be conscientiously scrupulous of taking an oath, good and lawful men of the said county, then and there sworn and affirmed, and charged to inquire," etc., "it is presented," etc. From a rule of the court of oyer and terminer, set forth in the return, it appears the caption was amended under the sanction and by the direction of that court; and the whole is then certified to us to be truly copied from the minutes and files of the said court of oyer and terminer.

From the authorities which have been cited, it is clearly shown that the amendments to the caption returned with the *certiorari* might have been made in this court, upon proper evidence of the facts and of the entries on the minutes of the oyer and terminer. Propriety, convenience, and congruity, however, dictated the remission of the *certiorari* and return to that court, that the amendments might be made there. And it is to be observed, our rule did not direct the court to make the amendments, but simply placed the return again in their hands, that they might make them if there were before them grounds and documents to warrant the measure.

By the course we adopted the inconvenience and risk of the actual production in this court of the original minutes by the clerk of the county of Warren, as was done in the case of *Rex v. Darley*, were saved. It is, however, objected by the counsel of the defendant that the rule of this court "was made without any evidence on the part of the state that the said caption was

not a true copy from the minutes and files of the said county of Warren upon the said indictment, and that there was diminution in the said return." This remark results from an omission to notice the difference between making amendments here, and submitting the matter to the court below. If made here, plenary evidence of the facts which entered into the amendments would doubtless have been required; but such evidence was not necessary for the measure adopted by us. The oral certificate of the prosecuting attorney, that there were materials in the court below from which amendments might be made, that the minutes, and records, and files of that court would supply all alleged deficiency, and that the truth would be thereby attained and public justice saved from discomfiture by the mere blunder of the officer who had made out the caption, was sufficient. Let the uniform language of our entries be recollected, "upon allegation of diminution." Nor is there any weight in another objection in the defendants' brief, that our rule was made against the express certificate of the clerk of the county of Warren, that the original return was a true copy from the minutes and files. No precedent or principle has been cited, or can be shown, which shall give to the certificate so conclusive and uncontrollable an influence as is here claimed for it. The certificate was doubtless true at the time it was made. But will any one say, after consideration of the authorities, that an amendment of the return is thereby precluded?

It is further objected that the court of oyer and terminer ordered their clerk to amend the caption, whether there was anything to amend by or not; that the return does not state there was anything to amend by; and that the clerk has not amended the caption at first returned with the *certiorari*, but has made out and sent a new caption. The first of these remarks is founded on a misconception of the matters contained in the return. The court did not order the amendment, whether there was or was not cause for it, and ground to warrant it; but on the motion of the prosecuting attorney, and after due examination, and upon proper evidence, as we are bound to presume, they ordered the caption contained in the return to be amended. Is there indeed on our part any great presumption in supposing that the minutes of the court distinctly showed that the jurors were then and there sworn and affirmed, and who were sworn, and who affirmed; and that the latter alleged themselves to be conscientiously scrupulous, which in-

deed they have themselves set forth on the face of the indictment? The court do not in their rule express the causes or reasons for it, nor did practice or convenience require it, and hence the answer to the second topic of remark is also given. It is true, the clerk did not alter or amend, by interlineations and erasuros, the caption which had been in the first instance annexed to the *certiorari*, but adopted a much more discreet and judicious mode by making out and sending here a new copy containing such alterations as had been made by the direction of the court; and this manifestly is what the clerk means by the expression he has used, "new caption," for he certifies that it is truly copied from the files of the court.

Upon the whole, on a careful and deliberate review, we find nothing irregular or illegal in the rule of this court in respect to the amendments; nor in the proceedings of the court of oyer and terminer consequent upon that rule. By the return to the *certiorari* as it now stands, certain of the exceptions originally taken, and since renewed, are not sustained in point of fact. They need therefore no further examination.

Another exception is, "that it does not appear that the persons supposed to be the grand jury had been summoned and returned as such." The answer to this exception is given by most, if not by all, the precedents of captions to be found in the books: 2 Hale, P. C. 165; Foster, 3; 1 Saund. 249; Crown, Cir. Comp. *passim*; 4 Chit. 189, *et seq.*; Archbold, Cr. Pl. 6, and especially the precedent sanctioned by this court: *The State v. Gustin*, 2 South. 746. To all these the present caption is conformable. It is not set forth that the grand jurors were summoned, or the manner of it other than in the words, "by the oath of A., etc., good and lawful men of the said county, then and there sworn and charged to inquire for the king, and for the body of the said county." In a very few of the precedents the words "impaneled, sworn, and charged," are used, but in a case reported in 3 Salk. 191, in the second of Anne, an exception to a caption for the want of the word "impaneled," was overruled, and the word held to be unnecessary.

Another exception is "that the indictment charges the publication of the forged acquittance and receipt to have been with intent to defraud Jonathan Oliver, and it appears by the indictment that to utter and publish it could not defraud him." No reasoning is given in the defendant's brief in illustration of this exception, and the manner in which it was intended to be enforced is not readily seen. The rule in respect to this allega-

tion in indictments is well understood. It is not necessary to prove that the person intended to be defrauded was actually defrauded. If, from circumstances, the jury can presume it was the intention of the defendant to defraud him; if, in fact, he might have been defrauded had the forgery succeeded, this allegation is satisfied. Now, in the present case, the instrument alleged to be forged, and the publication whereof is charged on the defendant in the indictment, purports to be a receipt given by Oliver to Jones, the defendant, for a certain sum of money, in full of the debt, interest, and costs, of a judgment obtained by Oliver against Jones before a justice of the peace, which Jones had removed, by *certiorari*, into the supreme court. If this forgery had succeeded, can we say, especially at this stage of the cause, that Oliver might not have been defrauded?

Another exception is, "that the defendant is described in the indictment to be late of the township of Hardwick, in the county of Warren, and that on the twenty-eighth of August, 1824, the time when the offense is charged to have been committed, there was no such township, and consequently no such person as John I. Jones of that township." This objection is founded in error. The description of place has reference to the time of the finding of the indictment, not of the commission of the crime. At the time this indictment was found there was, and for nearly two years had been, the township of Hardwick in the county of Warren, and Jones was and had been a resident there.

The remaining exception is, "that by the indictment which was found in the county of Warren, the crime charged appears to have been committed in the county of Sussex." In the month of November of that year, the county of Sussex was divided. A new county, called Warren, was set off from it, of which the township of Mansfield composed part, and after the division was called the township of Mansfield in the county of Warren. The indictment charges that the offense was committed on the twenty-eighth day of August, 1824, at the township of Mansfield, the said township of Mansfield then being in the county of Sussex, and now, at the time of finding, being in the county of Warren. The description is strictly conformable to the fact. In the act of the legislature setting off the county of Warren from the county of Sussex, there is no express provision that offenses previously committed in that part of the ancient county of Sussex, created into the new county, should be cognizable in the courts of the latter. It contains a provision that all suits then commenced should proceed in the county of Sussex,

which carries a strong implication that new suits should be commenced and prosecuted within the proper and respective counties. But no such express provision was necessary. It followed from the principles of the common law that the crime should be prosecuted in the courts of the county of Warren. Crime, as to the place of trial, is local; and the court, being a court of the same state which has jurisdiction over the place where the crime was committed, has cognizance and may hold plea of the crime. No rule or principle of the common law is thereby infringed. At common law a grand jury may not inquire of facts committed without the territorial limits of the county in which they sit, and the petit or traverse jury should be convened *de vicineto*. In the present case, the crime, if committed, was perpetrated within the bounds of the county of Warren, and the whole township of Mansfield being in that county, the jury may be brought from the vicinage, even if that term be used in its most ancient and restricted signification.

The erection of a new county is erroneously supposed to create in this respect some new relation. The offense is against the state, not against the county, and as we find here, a grand jury sitting to inquire for the state, and for the body of the county within which the matter occurred, a petit jury of the neighborhood, and a court having cognizance of offenses of this nature, we perceive every requisition of the common law fulfilled, and are not compelled to deplore the spectacle of a criminal pointing in scorn at the figure of justice with her sword broken and her arm palsied. Suppose the legislature had created a new court for the trial of crimes, the county of Sussex remaining the same, could any doubt of its jurisdiction exist because of its creation subsequent to the perpetration of the offense?

The argument drawn by the defendant's counsel from a supposed cession of the township to Pennsylvania or some foreign jurisdiction, even if sound, has no force, for the place here remains in the same state, under the same government, and the offense, as already remarked, is against the peace of the state, and there is, therefore, no incongruity in either describing or punishing it, as there might be in averring it to be against the peace of Pennsylvania, or in prosecuting a crime in a state different from or foreign to that in which it was committed. Nor is there any analogy to another case mentioned in the brief of the defendant's counsel; a murder, when the stroke was inflicted in one county, and the death happened in another, which could

not be indicted in either at common law. The reason is given in the preamble of the ancient statute: 2 and 3 Edw. 6, ch. 24: "By the custom of this realm, the jurors of the county where such party died of such stroke, can take no knowledge of such stroke, being in a foreign county. Nor the jurors of a county where the stroke was given can not take knowledge of the death in another county." In other words, one of the facts necessary to constitute the crime occurred without the territorial jurisdiction of each grand jury, and of it they could, therefore, receive no proof; but in the case before us, all the ingredients of the crime, if they occurred anywhere, took place in the county of Warren.

The exceptions are overruled.

Let the defendant plead to the indictment.

CAPTION OF INDICTMENT MAY BE AMENDED even after verdict: *State v. Creight*, 2 Am. Dec. 656, and note, 659. An indictment can not be amended: *State v. Sexton*, 14 Id. 584. In *State v. Washington*, 1 Id. 601, it was decided that if a forgery was done with intention to defraud, it was of no consequence whether any person was actually defrauded or not, so far as the commission of the crime is concerned.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

WILLARD v. STONE.

[7 COWEN, 22.]

INFANT'S CONTRACTS are not void, but only voidable at his election.

INFANT MAY SUE ON A BREACH OF PROMISE to marry, although if sued on such a promise his infancy would be a good defense.

RUMORS OF IMPROPER CONDUCT BY THE PLAINTIFF, in an action on a breach of promise to marry, are not admissible in evidence for the defendant.

PLAINTIFF'S LICENTIOUS OR IMPROPER CONDUCT with third persons may be proved in mitigation of damages in an action for a breach of promise of marriage, whether such conduct occurred before or after the breach.

TENDER OF MARRIAGE BY THE PLAINTIFF is unnecessary to support an action for breach of promise to marry.

REFUSAL TO MARRY may be inferred from a total cessation of intimacy without explanation.

ASSUMPSIT for breach of promise of marriage. The plaintiff proved the defendant's promise to marry her, and that after his return from a journey to the west he ceased all intimacy with her, refusing to give any explanation when demanded by the plaintiff's friends. The defendant offered to prove that during his absence there was a general rumor that one Frink had supplanted him in the plaintiff's affections, of which he was informed on his return; but the evidence was rejected. He also offered to prove that after the discontinuance of his intimacy with the plaintiff she had been guilty of gross and indecent familiarities with the said Frink; but the evidence was rejected. The defendant insisted that the plaintiff must show that she requested him to fulfill his promise, or that she had tendered performance of the contract on her part; but the judge left it to the jury to say whether or not a breach had been

sufficiently proved. The defendant further objected that the plaintiff being an infant her promise was invalid, and there was, therefore, no consideration for his promise; but the objection was overruled. Verdict for the plaintiff. The defendant moved in arrest of judgment on the ground of the plaintiff's infancy, and for a new trial, assigning error in the rulings of the judge above mentioned.

J. A. Spencer, for the defendant.

Allen, contra.

By Court, SUTHERLAND, J. The motion in arrest of judgment is founded on the infancy of the plaintiff. The decision in *Hunt v. Peake*, 5 Cow. 475 [15 Am. Dec. 475], disposes of this objection. The contracts of infants are not void, but voidable at their election only. They are binding on those who contract with them; and the precise point of the capacity of an infant to maintain an action on a contract of marriage was much considered, and, after several arguments, finally settled in *Holt v. Ward Clarendieux*, 2 Str. 937. An infant plaintiff may maintain this action, though infancy will be a defense against it.

The evidence offered by the defendant, of rumors and reports in the neighborhood, that he had been supplanted in the plaintiff's affections, by Frink, during his absence at the westward, and that the plaintiff's manners and conduct to Frink were spoken of with disapprobation, was properly rejected. If her conduct was improper in relation to that individual, the defendant should and might have proved the fact. If it was not, she ought not to suffer from the unfounded calumnies which may have been propagated against her, the truth or falsehood of which the defendant had the power of ascertaining.

The case of *Johnson v. Caulkins*, 1 Johns. Cas. 116 [1 Am. Dec. 102], seems to decide that in an action for a breach of promise of marriage, the defendant may give in evidence, in mitigation of damages, the licentious or improper conduct of the plaintiff, not only before, but subsequent to the breaking off of the contract. The court there consider the action as brought, not only to recover compensation for the immediate injury sustained, but also damages for the loss of reputation, which, as they observed, must necessarily depend on the general conduct of the party subsequent, as well as previous, to the injury complained of. The chief justice, Lansing, dissented in that case; but we are not aware that it has ever been overruled.

The evidence offered of the gross and indecent familiarities

between the plaintiff and Frink, subsequent to the defendant's refusal to consummate his engagement, was, therefore, improperly rejected. It should have been received in mitigation of damages; and on that ground a new trial must be granted.

A tender of marriage on the part of the plaintiff was not necessary; and the evidence fully authorized the jury in finding a refusal on the part of the defendant. A new trial must be granted, with costs, to abide the event.

New trial granted.

Followed in *Palmer v. Andrews*, 7 Wend. 144, on the point that in an action for breach of promise to marry, evidence of grossly indecent or improper conduct on the part of the plaintiff with other persons is admissible in mitigation of damages; although it did not appear in that case whether the alleged misbehavior occurred before or after the promise. The authority of the principal case on the same point was recognized in *Bennett v. Smith*, 21 Barb. 447, and in *Johnson v. Jenkins*, 24 N. Y. 258, *per Davies, J.*, dissenting. The same doctrine was approved and applied in *Button v. McCauley*, 5 Abb. Pr. (N. S.) 32. The rule adopted in the foregoing decision, that in actions of this sort the breach of promise may be implied from circumstances, is followed in *Hubbard v. Bonestell*, 16 Barb. 361; and upon the same principle it was held in *Hotchkiss v. Hodge*, 38 Barb. 121, to be well settled that the promise may also be implied from "long bestowed and particular attentions having apparently an honorable object."

MUTUAL PROMISES TO MARRY are respectively a good consideration, the one for the other: *Burke v. Shain*, 5 Am. Dec. 616. It was held, however, in that case that if no time or place for the performance of the contract was specified an offer to perform must be averred by the plaintiff, mere readiness and willingness not being sufficient. But in *Johnson v. Caulkins*, 1 Am. Dec. 102, an offer of performance was held unnecessary.

EVIDENCE OF PLAINTIFF'S MISCONDUCT IN MITIGATION.—The doctrine laid down in the principal case on this point is identical with that of *Johnson v. Caulkins*, 1 Am. Dec. 102. In the note to that case, *Willard v. Stone* and the other New York decisions on this point are referred to. In *Boydton v. Kellogg*, 3 Am. Dec. 122, it was held that in an action for a breach of promise of marriage, and for seduction, evidence of the plaintiff's general bad character between the time of the promise and the breach was inadmissible in mitigation of damages.

FULLER v. WILLIAMS.

[7 COWEN, 53.]

VENDOR'S DUTY TO DEMAND DEED.—To sustain an action by the purchaser on a contract to convey, it is necessary to demand a deed of the vendor, and after waiting a reasonable time, to call on him and offer to receive it. IN CASE OF THE VENDOR'S DEATH, before such demand it must be made in like manner of the heirs to enable the vendee to sue the personal representative on the contract.

THAT THE HEIRS ARE NUMEROUS and widely dispersed does not dispense with demand upon them.

DEMAND UPON THE ADMINISTRATOR is nugatory, as he has no control of the land.

ASSUMPSIT to recover damages on a special contract to convey land. The case was before the supreme court at a previous term, and is reported under the title of *Fuller v. Hubbard*, in 16 Am. Dec. 423, where the material facts are stated. A new trial having been had in accordance with the decision of the court at the former hearing, a verdict was taken for the plaintiff subject to the opinion of the court.

J. A. Collier, for the plaintiff.

G. C. Bronson, contra.

By Court, WOODWORTH, J. When this cause was before the court on a former occasion, 6 Cow. 13, we decided that, in order to sustain an action by the purchaser of land on a contract to convey, it was necessary to demand a deed of the vendor; and after waiting a reasonable time, to call on him and offer to receive it.

The case now to be considered contains additional evidence, and presents several new questions. Smith, the intestate, contracted to convey to the plaintiff a lot of land, after receiving payment. He received a part in his life-time, and his administrators, the defendants, since his death, the residue. The plaintiff has elected to prosecute the administrators. The declaration is on the written contract, and also contains the common counts.

The first question that arises is, whether the plaintiff has shown enough to put the heirs in default, and entitle him to maintain an action against them. If he has not, the administrators are not liable. They have no authority to convey; have no control over the land; and ought not to apply the assets of the intestate, unless he was liable in his life-time, by reason of non-performance, or those, on whom has devolved since his death the duty to perform, have neglected and refused. In this case, the land descending to the heirs at law of Smith, they are the persons to convey. The right to recover depends on the fact that the plaintiff has done, as between him and the heirs, all that can be required to entitle him to a conveyance. A demand of a deed from the defendants is altogether irrelevant. They can not convey; nor are they bound to seek the heirs.

If difficulties occur in consequence of the number, the in-

fancy, or the dispersed state of the heirs, it is the misfortune of the vendee, produced by the death of the vendor. So, also, the demand made on James Clapp, who had been attorney for Smith, in his life-time, in making contracts for sale of his land, and attorney for the defendants to collect the money due from the plaintiff, was a nugatory act. Mr. Clapp was not attorney for the heirs, or under any obligation to procure a conveyance. That he and the defendants took measures to obtain deeds, was not in consequence of any legal liability; but manifestly proceeded from a laudable desire to aid the purchasers in procuring their titles. Their acts may, therefore, be considered as gratuitous; and would seem rather to claim the acknowledgments of the purchasers for having so nearly accomplished the object than to lay the foundation of an action in consequence of a partial failure. In one point of view the plaintiff may call the acts of the defendants to his aid; although not bound to procure a deed, yet in point of fact they did apply in behalf of the plaintiff to some of the heirs; and were successful. A deed was executed by six of the brothers and sisters of Smith, the intestate, and by William S. Smith, the devisee of William S. Smith, a brother of the deceased; and by James R. Smith, one of the heirs of another brother. As it respects the last-named grantors, they have admitted the sufficiency of the demand on them by complying with it. It is in evidence that they executed a deed agreeably to the contract, which was offered to the plaintiff, and refused. So far, therefore, as they were concerned the plaintiff has not made out a cause of action; they having done all that could be required, or that they had lawful authority to perform. I admit that the plaintiff is entitled to a conveyance from all the heirs. He is not obliged to accept the title of a part. It is also conceded that if the plaintiff has done all that is necessary on his part, and any one of the heirs refuses to carry into effect this contract of their ancestor, the action can be maintained. This consequence necessarily flows from the position laid down that all the heirs must unite in conveying the title. This obstinacy or neglect of one having but a small interest, may be adverse to the interest of all. That, however, is incident to the condition in which the heirs are placed, and if an injury, it is one to which they are subjected.

The question then recurs, Has the plaintiff put any of the heirs in default? From the testimony of Mr. Clapp, it appears that the heirs of the vendor are six brothers and sisters: William

S. Smith, devisee of William S. Smith, a brother; James Ross Smith and Ann Smith, children and heirs of another brother; and the children of Maria Bancker, a sister of the half blood. Mr. Clapp thought, when he drew the form of the deed to be executed by the heirs, that the grandchildren of Maria Bancker could inherit, and inserted their names accordingly. This was a mistake. Our statute of descents extends to brothers and sisters, equally of the half blood as those of the whole blood; but not to the grandchildren. Consequently, the children only of Mrs. Bancker inherit one ninth of the real estate.

Marinus Willet and Margaret, his wife, a daughter of Mrs. Bancker, it appears, live in New York. There is no evidence that a deed had been demanded from them. Mrs. Bancker had four other children. Where they reside, or whether any demand has been made on them, does not appear. Ann Smith, one of the children of James R. Smith, a brother, resides in New York. There is no evidence of a demand on her. A deed having been executed, conveying all the title, except the one ninth owned by the children of Mrs. Bancker, and the half of one ninth owned by Ann Smith, it was incumbent on the plaintiff to show a demand on them, or offer a sufficient excuse in law for not making a demand. As to the last named heirs, he has not given any proof. For aught that appears, an application being made, they would also have executed, and thus perfected the plaintiff's title. The plaintiff can not change his claim to have a title, to a claim of compensation in damages, until he has shown the necessity of resorting to that alternative. The land may have greatly fallen in value between the time when the deed was to be executed, and the time when a demand was made. It would be most unreasonable to permit a recovery in damages, when the party was ready to perform. The plaintiff proved by a witness, that Hubbard informed him that John Adams Smith was an heir, and that he was in Europe.

If William S. Smith, the brother of Smith, the intestate, had not devised to his son William, but had died intestate, John Adams Smith would be one of the persons who ought to convey; and it is probable that Mr. Hubbard may have made the declaration ascribed to him without adverting to the fact that, by the devise, the right and title of William S. Smith, the brother, passed to the devisee. Be that, however, as it may, we are satisfied from the case, that J. A. Smith was not a necessary party to the conveyance.

In 6 Cow. 22¹, it was decided that the judgment recovered against Smith, the intestate, was no ground, in a court of law, for rescinding the contract; that conveyance is good and perfect without warranty or personal covenants, and that such a conveyance will satisfy the terms of this contract.

It is unnecessary to express any opinion as to the measure of damages, the defendants being entitled to judgment.

Judgment for the defendants.

This decision is usually cited in the New York reports in connection with *Fuller v. Hubbard*, 6 Cow. 13; S. C., 16 Am. Dec. 423; a former decision in the same case. See the note to *Fuller v. Hubbard*, 16 Id. 427.

JACKSON v. SHEPARD.

[7 COWEN, 88.]

RECITALS IN A TAX DEED showing that the various steps required by statute preparatory to a sale were duly taken, as, for instance, that the tax was first demanded at the dwelling-house of the person assessed, are not even *prima facie* evidence of that fact.

WHERE A SPECIAL STATUTORY POWER is given to sell land for taxes in particular cases, a purchaser at such sale must show that every prerequisite to the exercise of that power was performed.

EJECTMENT for certain land. The plaintiff claimed under a sale made to pay a direct tax assessed against the former owner of the premises under an act of congress of July 22, 1813. Judgment of nonsuit and motion to set the same aside, and for a new trial. The facts are sufficiently stated in the opinion.

J. L. Viele, for the plaintiff.

E. Cowen, contra.

By Court, SUTHERLAND, J. The plaintiff's title depends on the validity of the deed of the twentieth of December, 1816, from Thomas Palmer, collector of the revenue for the eleventh collection district of the state of New York, to Samuel Cook, one of the lessors of the plaintiff. The deed was given upon a sale made in pursuance of the act for the assessment and collection of direct taxes and internal duties, passed July 22, 1813: 4 U. S. L. 546, ch. 554. The manner in which the collector is to proceed in the collection of the taxes imposed, and his authority to sell the houses and lands on which the tax is laid, under certain circumstances, are embraced in the twenty-first and twenty-

1. *Fuller v. Hubbard*, 16 Am. Dec. 423.

second sections of the act. The twenty-first section directs that each of the collectors, or his deputies, shall, within ten days after receiving his collection list, advertise in one newspaper printed in his collection district, if any there be, and by notifications to be posted up in at least four public places in his collection district, that the said tax has become due and payable; and state the times and places at which he or they will attend, to receive the same, etc., and with respect to persons who shall not attend according to such notification, it shall be the duty of each collector, in person, or by deputy, to apply once at their respective dwellings within such district, and there demand the taxes payable by such person; and if such taxes shall not then be paid, or within twenty days thereafter, it shall be lawful for such collector, or his deputies, to proceed to collect the taxes by distress and sale of the goods, chattels and effects of the persons delinquent. The twenty-second section provides, that whenever goods, chattels, or effects, sufficient to satisfy any tax upon dwelling-houses or lands, and their improvements, owned, occupied, or superintended by persons known and residing within the same collection district, can not be found, the collector having first advertised the same for thirty days in a newspaper within the collection district, if such there be, and having posted up, in at least ten public places within the same, a notification of the intended sale thirty days previous thereto, shall proceed to sell at public sale so much of the property as may be necessary to satisfy the taxes due.

From these provisions of the act, it appears that the collector is bound to apply once at the dwelling-house of each individual taxed, and there demand the taxes imposed on each. If not paid upon such demand, he can proceed to collect it by distress. And it is only in cases where no goods or chattels to satisfy the tax can be found, that the collector has authority to sell the real estate on which the tax is imposed.

The premises in question were assessed as the property of William C. Bussing, and taxed at one dollar and forty-six cents; and there is no evidence in the case, except the recitals contained in the collector's deed, that the tax was ever demanded at the dwelling-house of Bussing, or that sufficient goods and chattels to satisfy the tax could not be found. The judge who tried the cause decided, that the recitals in the deed were not evidence; and nonsuited the plaintiff for the want of competent proof of a compliance on the part of the collector,

with the conditions precedent to his authority to sell and convey the land.

The case of *Williams v. Peyton's Lessee*, 4 Wheat. 77, is precisely analogous; and fully sustains the decision at *nisi prius*. The defendant in that case was a purchaser at a sale made for the non-payment of the direct tax imposed by the act of congress of the fourteenth of July, 1798. He proved that the tax on the lands in controversy had been charged to the plaintiffs; and that they had been sold for non-payment. He also gave in evidence a deed from the marshal of the district, for the premises in question, executed in pursuance of the act of the third of March, 1804. But he did not prove that the collector had advertised the land, and performed the other requisites of the law of congress; and it was held by the court, that as the collector had no general authority to sell lands for the non-payment of the direct tax, but a special power to sell in the particular cases mentioned in the act, those cases must exist, or his power to sell did not arise. That it was a mere naked power, not coupled with an interest; and that in all such cases, the law requires that every prerequisite to the exercise of that power must precede its exercise; the agent must pursue the power, or his act will not be sustained by it.

It was contended, in that case, that a deed executed by a public officer is *prima facie* evidence that every act which ought to precede it had preceded it; that the marshal's deed, therefore, must be considered valid and effectual, unless it was impeached by showing a failure in the performance of his duty. But it was answered by the court, that a party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under that deed is as much bound to procure the performance of the act as he would be to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. The facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title. It is then asked by the court, whether there is anything which will render that general principle inapplicable to the case of lands sold for the non-payment of taxes, and they held there was not; that all the acts required to be performed previous to the right to sell for the non-payment of taxes, were susceptible of complete proof on the part of the officers of govern-

ment, and consequently, on the part of the purchaser, who ought to preserve the evidence of them. But many of them were of a nature which it would be difficult, if not impossible, for the party upon whom the tax was imposed to prove had not been performed. It is remarked that the act of congress does not declare that these conveyances shall be *prima facie* evidence of the validity of the sale; and that the nature of the transaction was not such that a court ought to presume in its favor anything which did not appear.

The provisions of the act of 1798 are substantially the same with that of 1813. The chief object of the principal provisions of both is to give full notice to the individual upon whom the tax is assessed, that he may voluntarily pay it, without resort to coercive means; and if coercion becomes necessary, that it shall, in the first instance, be directed to the personal property, and that the real estate on which the tax is imposed shall not be resorted to until the personal property is exhausted.

It is not perceived that the case at bar is, in any essential respect, distinguishable from that of *Williams v. Peyton's lessee*. And the question being one which arises upon the construction of an act of congress, we should be disposed to yield to that decision as authority, even if the reasons assigned for it by the court were not entirely satisfactory to us. But such is not the case. The principles on which it is founded are of general authority and application, and seem to us to be incontrovertible. The case of *Stead's ex'r v. Course*, 4 Cranch, 403, and *Parker v. Rule's lessee*, 9 Id. 64, maintain the same general principle.

The plaintiff was, therefore, properly nonsuited, and the motion to set it aside, and for a new trial, must be denied.

New trial denied.

RECITALS IN TAX DEED AS EVIDENCE.—In the absence of any statutory provision to the contrary, it is a settled rule of law that upon a sale of land for delinquent taxes, neither the tax deed itself, nor any of the recitals contained therein, are evidence against the owner that the proceedings have been regular. The power to sell land for taxes is a special statutory power, in derogation of the common law, and unless it is strictly pursued, the title of the owner is not divested: *Polk v. Rose*, 25 Md. 153; *Scales v. Alvis*, 12 Ala. 617; *Atkins v. Kimman*, 20 Wend. 249. Indeed, this is a general principle, applicable to all mere statutory proceedings not in the ordinary course of the law, for divesting title to property: *Bloom v. Burdick*, 1 Hill, 142; *Sherwood v. Reade*, 7 Id. 434; *Corwin v. Merritt*, 3 Barb. 343; *Curtis v. Leavitt*, 15 N. Y. 189, all citing the principal case.

And since it is necessary that the power to divest title by such a sale must be strictly pursued, it is equally necessary that he who acquires the title should show that the power has been so pursued. He must prove that every

requisite of the statute has been complied with: *Sharp v. Johnson*, 4 Hill, 92; *Striker v. Kelly*, 7 Id. 25; *Hubbell v. Weldon*, Hill & Denio, 145; *Stevens v. Palmer*, 10 Bos. 65; *Bush v. Davison*, 16 Wend. 550; *Graves v. Bruen*, 11 Id. 431; *Norris v. Russell*, 5 Cal. 249; Cooley on Taxation, 328, 354. But this principle was held in *Brown v. Wilbur*, 8 Wend. 660, not to apply to a sale by loan officers, their power being coupled with an interest. The grounds upon which it is applied to tax sales are very forcibly stated by Goldborough, J., delivering the opinion of the court in *Polk v. Rose*, 25 Md. 153. After remarking that the power confided to a tax collector or other officer to make sales of property in such cases is one specially delegated, the learned judge says:

“A series of acts, preliminary in their character, are required by law to precede the execution of the power. Each and every step, from the assessment of the property for taxation, to the consummation of the title, by delivery of the deed to the purchaser, is a separate and independent fact. All of these facts, from the beginning to the end of the proceeding, must exist, and if any material link in the chain of title is wanting, the whole is defective, for want of sufficient authority to support it. The party claiming under the power is chargeable with notice of every irregularity in the proceedings of the officers, and the *onus* is upon him to show the faithful execution of the power.

“This requisition is especially applicable to the purchaser at a tax sale. There is no hardship in this. At such sales it is notorious that the amount paid by purchasers is uniformly trifling in comparison with the value of the property sold: See Blackwell on Tax Titles, 65. While the maxim of law, ‘*omnia rite præsumuntur*,’ is appropriate only to judicial proceedings, no intendment, with respect to the exercise of it, is to be made in favor of a specially delegated power; so that every act, the performance of which is made a condition precedent to the validity of the acts of a special agent, whether appointed for a public or private purpose, must be shown by proof. The *onus* is upon the purchaser at a tax sale, he must establish affirmatively that the officers acted strictly in conformity with the law. The acts of the officers are matters *in pais*; their existence is not made out by intendment, but must be proved.”

An equally clear and cogent statement of the principles upon which the doctrine is based, is contained in the opinion of the court in *Sharp v. Speir*, 4 Hill, 86. That was a case of a sale of land to pay a tax due a municipal corporation. The defendant, who was the holder of the tax title, relied upon his deed as evidence both of the authority of the officers of the corporation to sell the land, and of the regularity of their proceedings. Bronson, J., delivering the opinion, said:

“Every statute authority, in derogation of the common law, to divest the title of one, and transfer it to another, must be strictly pursued, or the title will not pass. This is a mere naked power in the corporation, and its due execution is not to be made out by intendment; it must be proved. It is not a case for presuming that public officers have done their duty, but what they have in fact done must be shown. The recitals in the conveyance are not evidence against the owners of the property; but the fact recited must be established by proofs *aliunde*. As the statute has not made the conveyance *prima facie* evidence of the regularity of the proceedings, the fact that they were regular must be proved, and the *onus* rests on the purchaser. He must show, step by step, that everything has been done which the statute makes essential to the due execution of the power. It matters not that it may be difficult for the purchaser to comply with such a rule. It is his business to col-

lect and preserve all the facts and muniments upon which the validity of his title depends: *Rex v. Croke*, Cowp. 26; *Williams v. Peyton*, 4 Wheat. 77; *Ronkendorf v. Taylor*, 4 Pet. 349; *Jackson v. Shepard*, 7 Cow. 88; *Atkins v. Kinnan*, 20 Wend. 241; *Thatcher v. Powell*, 6 Wheat. 119; *Jackson v. Esty*, 7 Wend. 148; *People v. Mayor, etc., of New York*, 2 Hill 9; *Matter of Mount Morris Square*, Id. 14. These cases, and those to which they refer, will be sufficient to justify all that has been said concerning the necessary requisites for making out a title in the defendant."

The proof of compliance with the requirements of the statute must be made *aliunde*, and not by the deed itself. It would be idle to require proof that the power to sell had been strictly pursued, if the deed were made evidence of that fact. That neither the deed nor its recitals are evidence of compliance with the statutory requisites is well established: *Jackson v. Roberts*, 11 Wend. 432, *per* Edmunds, Senator; *Varick v. Tallman*, 2 Barb. 117; *Harrington v. People*, 6 Id. 611; *Hoyt v. Dillon*, 19 Id. 644; *Love v. Gates*, 4 Dev. & B. 463; *Pentland v. Stewart*, Id. 386; *Smith v. Corcoran*, 7 La. 46; *Jesse v. Preston*, 5 Grat. 120; *Reed v. Field*, 15 Vt. 672; *Brown v. Wright*, 17 Id. 97; *Phillips v. Phillips*, 40 Me. 160; *Worthing v. Webster*, 45 Id. 270; *Phillips v. Sherman*, 61 Id. 548; *Blackwell on Tax Titles*, 73; *Hilliard on Taxation*, 506, 509, 519; *Burroughs on Taxation*, 332. A recital, therefore, to the effect that all the requirements of the statute have been fulfilled, will not dispense with proof of the fact that the tax was unpaid: *Hoyt v. Dillon*, 19 Barb. 644. So, where the tax collector recites in his deed that "he has in all things pursued the directions of the statute," such recital is not even *prima facie* evidence of such compliance: *Brown v. Wright*, 17 Vt. 97. So, where he covenants that the taxes were duly assessed and published; that notice of the sale was given according to law; and that the directions of the statute had been observed in all respects: *Phillips v. Phillips*, 40 Me. 160. Indeed, it is a general rule, that recitals in a deed are not evidence, except between parties and privies: *Hill v. Draper*, 10 Barb. 463, *per* Allen, J., citing the principal case. Hence, as the former owner of the land is not a party to the deed, there is no ground upon which the recitals contained in it should be made evidence against him. If the ordinary legal presumption, that official duty has been regularly performed, is not sufficient to give *prima facie* validity to a tax collector's deed, the fact that he says he has done his duty can not help the matter.

There are some cases, however, at variance with the doctrine laid down in *Jackson v. Shepard*, on this point. It seems to have been held in Kentucky, in the absence of any statute, that a tax deed is *prima facie* evidence that the proceedings have been according to law, on the ground of the legal presumption that every officer of the government has done his duty: *Allen v. Robinson*, 3 Bibb, 326; *Bodley v. Hord*, 2 A. K. Marsh. 244; *Currie v. Fowler*, 5 J. J. Marsh. 145; see, also, *Blight's Heirs v. Banks*, *ante*. In *Morton v. Waring*, 18 B. Mon. 72, it was decided that the recitals in a register's deed of land sold for taxes, to the effect that he had complied with the requirements of the statute, were evidence, but not recitals of other facts which were not within the register's knowledge. In Vermont, also, it was held in several early decisions that a deed from a collector of a state tax, was evidence of compliance with the provisions of the statutes, but the same principle was not applied where land was sold for a mere local or special tax. In *Powell v. Brown*, 1 Tyler, 285, the deed in question was made by a collector of a proprietary tax, and the court refused to admit the deed itself as evidence of the regularity of the proceedings. In their opinion they thus stated the rule, which was held to prevail in that state: "Where the deed of a collector of a

tax assessed and levied immediately by the state, is exhibited in evidence, and the deed sets forth that the collector hath in all things pursued the law, it shall be considered as *prima facie* evidence of a legal sale. * * * But the deed of a collector of a proprietor's tax is not even *prima facie* evidence of a legal sale. The law will not render that respect to the doings of the servant of a private corporation, which it pays to the acts of an acknowledged officer of the state." So, in *Parker v. Bixby*, 2 Tyler, 466, it was held that a recital in the deed of a sheriff, as tax collector, to the effect that he had "in things proceeded according to law," was *prima facie* evidence of the regularity of his proceedings. In *Hall v. Collins*, 4 Vt. 316, it was held that recitals in a tax collector's deed were not evidence of the acts of other persons, although they might be of the acts of the collector himself. But it is now the established doctrine in that state that recitals in a tax deed are not evidence of the regularity of the officer's proceedings, or of those of any other person, unless made so by statute: *Reed v. Field*, 15 Vt. 672; *Brown v. Wright*, 17 Id. 97. In Pennsylvania it is well settled that as against a mere intruder a tax deed is *prima facie* evidence of title: *Foster v. McDivit*, 9 Watta. 344; *Foust v. Rosa*, 1 Watta. & S. 501; *Dikeman v. Parrish*, 6 Pa. St. 210; *Shearer v. Woodburn*, 10 Id. 511; *Troutman v. May*, 33 Id. 455.

THE LEGISLATURE HAS UNDOUBTED POWER to make tax deeds *prima facie* evidence not only of the regularity of the sales upon which they are based, but also that the prerequisites of the sale have been complied with: *Delaplaine v. Cook*, 7 Wis. 44; *Falkner v. Guild*, 10 Id. 563; *Knox v. Cleveland*, 13 Id. 245; *Stewart v. McSweeney*, 14 Id. 468; *Whitney v. Marshall*, 17 Id. 174; *Hand v. Ballou*, 12 N. Y. 541; *Allen v. Armstrong*, 16 Iowa, 506; *Groesbeck v. Seeley*, 13 Mich. 329; *Belcher v. Mhoon*, 47 Miss. 613; *Pillow v. Roberts*, 13 How. U. S. 472. And so far as the mere sale itself is concerned, the deed may even be made conclusive evidence of the regularity of the proceedings, but it is otherwise as to those preliminary steps which are, as it were, jurisdictional in their nature, and upon which the power to sell depends. A statute making a tax deed conclusive evidence of these facts, would, in effect, divest title arbitrarily and without due process of law, and would, therefore, be unconstitutional. This point has been conclusively determined in Iowa. It was provided in that state, by the revised statutes of 1860, that a tax deed should be *prima facie* evidence that the property was subject to taxation; that the tax was unpaid, and that there had been no redemption in the manner pointed out in the law, and conclusive evidence that the property was duly assessed, that the tax was levied according to law, that proper notice of sale was published, that the property was sold, that the grantee in the deed was the purchaser, that the sale was conducted as required by law, and that all the prerequisites of the statute, from the listing to the making of the deed, were fully complied with. But it was seriously doubted by Dillon, J., in *Allen v. Armstrong*, 16 Iowa, 508, whether this statute was constitutional so far as it undertook to make the deed conclusive evidence of a levy of the tax by proper authority. He said: "We state the principle, which must be legally and logically true, in this wise: If any given step or matter in the exercise of the power to tax (as, for example, the fact of a levy by the proper authority), is so indispensable that without its performance no tax can be raised; then that step or matter, whatever it may be, can not be dispensed with, and with respect to that the owner can not be concluded from showing the truth by a mere legislative declaration to that effect." But he admitted that the legislature had power to make the deed conclusive so far as mere irregularities in the exercise of the authority to sell were concerned. On this

point he took occasion to remark: "The clerical mistake of the year, and the other alleged defects in the notice of sale, being simply irregularities in the exercise of the power, and not a vital part of the power itself, fall within the principle just stated; and it is clearly within the power of the legislature to declare that they are not essential, for such, in effect, is the provision that the deed shall be conclusive evidence of their due performance."

It has since been conclusively determined that this statute is unconstitutional, so far as it attempts to make the tax deed conclusive as to matters jurisdictional; that is, to the prerequisites of the sale, and as to the fact of sale, while it is constitutional so far as it respects the manner of the sale: *McCready v. Sexton*, 29 Iowa, 356; *Hurley v. Woodruff*, 30 Id. 260; *Rima v. Cowan*, 31 Id. 125; *Martin v. Cole*, 38 Id. 141; *Gould v. Thompson*, 45 Id. 450. Under that statute, therefore, the deed is *prima facie* evidence of the preliminary and jurisdictional steps, and of the fact of the sale and the other facts mentioned in the statute, while it is conclusive as to the regularity of the sale: *Rima v. Cowan*, 31 Iowa, 125; *Martin v. Cole*, 38 Id. 141; *Gould v. Thompson*, 45 Id. 450; *Callanan v. Hurley*, 93 U. S. 387. So, where the charter of a city provided that "all deeds made to purchasers of lots sold for taxes or assessments, shall be conclusive evidence in all controversies in relation to the right of the purchaser to hold or recover the premises, except it be shown that no tax or assessment was levied on the lot or lots, or that the same was paid before the sale, or that the lot or lots were redeemed before the execution of the deed," it was held that the former owner might nevertheless show against such a deed that there never was any sale of the premises: *McNamara v. Estes*, 22 Iowa, 246. In other states, also, it has been decided that statutes making tax deeds conclusive, with respect to jurisdictional facts, or facts vital to the exercise of the power of taxation and sale, were unconstitutional: *Quinlon v. Rogers*, 12 Mich. 168; *Abbott v. Lindemower*, 42 Mo. 162; S. C., 46 Id. 291.

STATUTES HAVE BEEN ENACTED in most, if not all, of the states modifying the stringent common law rule, and making tax deeds *prima facie* evidence of the regularity of the preliminary proceedings as well as of the sale itself: *Cooley on Taxation*, 354, *Burroughs on Taxation*, 333; *Roberts v. Pillow*, 1 Hempst. 624; *Hunt v. McFadgen*, 20 Aik. 277; *Thweatt v. Black*, 30 Id. 732; *O'Grady v. Barnishel*, 23 Cal. 287; *Bowman v. Cockrill*, 6 Kan. 311; *Hobson v. Dutton*, 9 Id. 477; *State v. Herron*, 29 La. Ann. 848; *Sibley v. Smith*, 2 Mich. 486; *Johnson v. Elwood*, 53 N. Y. 431; *Turney v. Yeoman*, 14 Ohio, 207; *Stanberry v. Sillon*, 13 Ohio St. 571; *Woodward v. Sloan*, 27 Id. 592; *Lee v. Jeddo Coal Co.*, 84 Pa. St. 74; *Stewart v. McSweeney*, 14 Wis. 468. But a statute making such a deed "good and effectual in law and in equity" does not make it even *prima facie* evidence that the requirements of law have been complied with: *Hadley v. Tankersley*, 8 Tex. 12. And the fact that a tax deed is made evidence of compliance with the statutory requirements does not dispense with such compliance: *Merrick v. Hutt*, 15 Ark. 331; *Yenda v. Wheeler*, 9 Tex. 408; *Williams v. Kirtland*, 13 Wall. 306. It merely shifts the burden of proof to the party contesting the sale, and requires him to show its validity, or at least to make a *prima facie* case against it: *McNamara v. Estes*, 22 Iowa, 246; *Sibley v. Smith*, 2 Mich. 486; *Johnson v. Elwood*, 53 N. Y. 431; *Williams v. Kirtland*, 13 Wall. 306. The statute raises a presumption in favor of the validity of the proceedings, which must be overcome by affirmative proof of irregularity with respect to some substantial requisite: *Biscoe v. Coalter*, 18 Ark. 423; *Rayburn v. Kuhle*, 10 Iowa, 92. The *quantum* of proof necessary for this purpose is not fixed:

Daniels v. Burso, 40 Ill. 307. There must be evidence sufficient to restore the burden of proof to the owner of the tax title, by raising a presumption against it. The principle is thus clearly stated by Martin, J., in *Lacey v. Davis*, 4 Mich. 140: "The evidence sufficient to change the burden of proof must be such as to exclude any reasonable presumption of regularity; in other words, that the evidence of irregularity must be such as to require explanation, or counter-proof, and must be of matters which are peremptory and not directory, and that it is not sufficient to cast a general doubt over the title, but that it is necessary to point out some specific defect, or raise a reasonable presumption against the sufficiency of some particular act, or of the non-performance of some necessary duty." To the same effect are: *Wright v. Dunham*, 13 Mich. 414; *Genther v. Fuller*, 36 Iowa, 604; *Graves v. Bruen*, 11 Ill. 431. The *prima facie* effect of the deed will, however, be overcome by introducing the record of the board or tribunal authorized to levy the tax, if such record fails to show any levy or assessment: *Early v. Whittingham*, 43 Iowa, 162; *Easton v. Savery*, 44 Id. 654. Or by introducing the only affidavit on file of the posting of the notice of sale, where such affidavit omits to state that one copy was posted in the treasurer's office, as required by law: *Jarvis v. Silliman*, 21 Wis. 599. It will not be presumed that there is other sufficient evidence on those points. So, the presumption in favor of the deed will be overcome where a counter-presumption is raised that the title was in the United States when the sale was made.

Where a statute makes a tax deed *prima facie* or conclusive evidence of the regularity of the sale it has generally been held to apply merely to the sale, and not to dispense with proof of the levy and assessment, and other preliminary steps; and that recitals in the deed of such preliminary steps are not evidence: *Bridge v. Bracken*, 3 Chand. (Wis.) 75; *Parker v. Smith*, 4 Blackf. 70; *Wilson v. Lemon*, 23 Ind. 433; *Ward v. Montgomery*, 57 Id. 276; *Hill v. Leonard*, 4 Scam. 140; *Scott v. Detroit Y. M. Soc.*, 1 Doug. (Mich.) 121; *Latimer v. Lovett*, 2 Id. 204; *Striker v. Kelly*, 2 Denio, 323; *Tallman v. White*, 2 N. Y. 68; *Beckman v. Bigham*, 5 Id. 366. So, where the statute provides that on failure to redeem the land within the time required by law, the deed shall be *prima facie* evidence of the regularity of the proceedings, it must nevertheless be shown that the land was sold for taxes, and not redeemed: *Williams v. Kirtland*, 13 Wall. 306. So, if the deed is made *prima facie* or conclusive evidence of title, and the statute requires a sale of land for taxes to be founded on a judgment and precept, recitals in the deed are no evidence of such judgment and precept, or of authority to sell: *People v. Doe*, 31 Cal. 220; *Bolan v. Bolan*, 4 Nev. 150. So, in Illinois, where it is provided that the tax deed shall not be questioned, except on the ground that the tax has been paid, or that the land was not subject to tax, or has been redeemed, or that the description is insufficient, unless the contesting party shall first pay the amount of the tax, etc., it is held that the judgment and precept must be proved to make the deed evidence: *Chestnut v. Marsh*, 2 Ill. 173; *Spellman v. Curtenius*, Id. 409; *Charles v. Waugh*, 35 Id. 315; *Elston v. Kennicott*, 46 Id. 187; *Little v. Herndon*, 10 Wall. 26. So, where the statute makes the deed evidence that the requirements of law in making the sale have been complied with, it has been held that the deed is not thereby made evidence that prerequisites to the acquisition and exercise of the power to sell have been performed: *Robson v. Osborn*, 13 Tex. 298. So it has been decided that statutes making tax deeds conclusive evidence of the regularity of sales upon which they were founded did not dispense with *aliunde* proof of a notice required to be given after the

sale, and before the deed, that the time for redemption was about to expire: *Doughty v. Hope*, 3 Denio, 594; *Westbrook v. Willey*, 47 N. Y. 457.

RECITALS MUST SHOW, WHAT.—It is laid down as a general rule that where the statutes make a tax deed evidence of title, such deed must recite enough of the proceedings to show that the officer making the sale had authority to do so: *Cooley on Taxation*, 353, 362; *Blackwell on Tax Titles*, 368; *Woodward v. Sloan*, 27 Ohio St. 592. Thus in Indiana the deed is evidence only of the facts recited in it: *Ward v. Montgomery*, 57 Ind. 276. In Massachusetts the recitals must show the “cause of sale;” and, therefore, if the deed does not state that the tax was not paid within fourteen days after demand it is invalid: *Harrington v. Worcester*, 6 Allen. 576. In Tennessee it is held that the deed must show on its face that the sale was made at the time and place required by law: *Thompson v. Lawrence*, 58 Tenn. (2 Baxter) 415. In Missouri the deed must show that due notice of the sale was given, and that the statute was otherwise complied with. *Abbott v. Doling*, 49 Mo. 302; *Large v. Fisher*, Id. 307. In California the deed is evidence only if it contains recitals of compliance with the requisites of the statute: *Bucknall v. Story*, 36 Cal. 67. So in Arkansas it has been held that the recitals of the deed must show every prerequisite complied with: *Hogins v. Brashears*, 13 Ark. (8 Eng.) 242; and that if the deed does not recite for what year the tax was assessed, or that several tracts were sold separately, it is void: *Jacks v. Dyer*, 31 Ark. 334; *Spain v. Johnson*, Id. 314. On the other hand it seems to have been held in *Stedman v. Planters’ Bank*, 7 Ark. (2 Eng.) 424, and *Pleasants v. Scott*, 21 Id. 370, that a deed failing to recite compliance with all the requirements of the statute is not necessarily void. So it was held in *Sibley v. Smith*, 2 Mich. 486, that under a statute making a tax deed “*prima facie* evidence of the regularity of all the proceedings to the date of the deed,” such a deed will be evidence, even though it do not recite the proceedings. And in *Hobson v. Dutton*, 2 Kan. 477, it was decided that the omission to recite a fact which was a condition precedent to the execution of the power to sell was not fatal because it might be presumed that without performance of the condition the power would not have been exercised. But if the recitals show affirmatively that there was an irregularity in the proceedings, as that several distinct tracts were sold *en masse*, the deed will be void: *Montgomery v. Birge*, 31 Ark. 491; *Spain v. Johnson*, Id. 314. So if the recitals show that a written notice of sale was posted where the statute requires a printed hand-bill: *Lagroue v. Rains*, 48 Mo. 536. And if the officer making the deed undertakes by his recitals to set out all the proceedings, the omission of an important step will warrant the inference that it was not performed: *Long v. Burnett*, 13 Iowa, 28.

RECITALS OF LEGAL CONCLUSIONS.—It has been held in a number of cases in Missouri that where it is necessary for the deed to show by its recitals that the officer had power to make the sale, it must do so by stating the facts upon which the power depends, and not merely the conclusions from the facts. For instance, as the deed must show that due notice was given of the sale, it is necessary to state the facts as to the time and manner of publishing such notice, and it is not enough to recite merely that it was published “in manner and form as directed by law:” *Large v. Fisher*, 49 Mo. 307, or that it was “advertised according to law:” *Yankee v. Thompson*, 51 Id. 238, or that notice was given according to law: *Sparlock v. Allen*, 49 Id. 178.

On the other hand it is held to be sufficient, under the California statute requiring the assessment and other preliminary steps to be stated in the tax deed, to set them forth in the form of legal conclusions, as that the property was duly assessed, that the tax was duly levied without stating the rate or

amount, etc.: *O'Grady v. Barnishel*, 23 Cal. 287; *Brunn v. Murphy*, 29 Id. 326; *Wetherbee v. Dunn*, 32 Id. 106. The opinion of the court in *O'Grady v. Barnishel*, 23 Cal. 287, as delivered by Cope, J., with whom Field, C. J., and Norton, J. concurred, is very satisfactory on this point. The learned judge says: "The deed in this case states that the property was duly assessed, and that the taxes were levied upon it according to law, and states in the same manner other matters required by the act. The defendants claim that this mode of statement is not sufficient, and that there is no authority in the act for a deed setting forth the matters necessary to be stated in the forms of legal conclusions. Their position is that the deed must state the facts, and that the existence of these matters must appear from the facts stated; and that a statement amounting merely to a conclusion of law is not within the meaning of the act. This view is urged with much earnestness and force of argument; but a careful consideration of the act leads us to a construction different from that adopted by the learned counsel. The act must be construed with reference to the objects intended to be accomplished by it, and it will hardly be claimed that an interpretation which defeats this object is admissible. Of course, the primary object was to provide revenue for the support of the government, and the provisions in question constitute a part of the machinery devised for that purpose. The stringency of these provisions was intended to facilitate the collection, and to overcome, as far as possible, the difficulties which had always been experienced in enforcing payment.

"It had become proverbial that a tax title was no title at all, and a sale for taxes was as near a mockery as any proceeding having the appearance of legal sanction could be. The principal cause was the difficulty in proving the various steps essential to the validity of such a sale, and the intention was to change the rule of evidence upon that subject, and throw the burden of proof upon the party asserting the invalidity. The view contended for would entirely defeat this intention; for if the facts are to be stated in the deed, the effect is precisely the same as to require them to be shown *aliunde*. The only difference is in the mode of proof, and the embarrassment is rather increased than diminished; for if any material fact be omitted, the deed is invalid, and cannot be given in evidence. The purchaser is subjected to the double risk of an error in the previous proceedings, and a mistake in setting these proceedings forth in the deed, either of which would be fatal. These results are plainly in contravention of the purpose intended, and the language of the act is no less conclusive. The general provision is, that the matter specified shall be stated; but in respect to the publication of the notice of sale, it is provided that the manner of publication shall be described. If it were intended that the same particularity should be observed in other respects, that intention would doubtless have been expressed; and the maxim, *expressio unius est exclusio alterius*, applies. We regard the deed as conforming substantially to the requirements of the act, and our conclusion is that no error was committed in allowing it to be given in evidence. It is true, some of the matters set forth are stated by way of recital, but as they distinctly appear, there is nothing in the manner of stating them for which the deed could properly have been rejected."

MISRECITAL, EFFECT OF. —It is not entirely clear, from the authorities, whether a holder of a tax deed is bound by misrecitals contained therein or not. It would seem, however, that so far as the recitals are necessary to the validity of the deed, the party claiming thereunder must be concluded by them, for if they could be aided, or enlarged, or contradicted by parol evidence offered by such party, it would be idle to require their insertion in

the deed. If, therefore, the deed is defective in reciting that notice of the sale was "advertised according to law," without stating the facts as to when, where, and how long it was advertised, etc., and is consequently void on its face, as held in *Yankee v. Thompson*, 51 Mo. 238, it follows necessarily that such defect will conclude the purchaser, and cannot be aided by parol. So it was held in *Jacks v. Dyer*, 31 Ark. 334, that it was necessary for a tax deed in Arkansas to show by its recitals for what year the tax was assessed, and that a failure in that particular could not be remedied by parol.

On the other hand, *Longfellow v. Quimby*, 33 Me. 457, is an authority for the position that, in some cases, at least, the holder of a tax deed may contradict by parol a recital contained therein which if it were admitted to be conclusive upon him, would invalidate the sale. The sale in that case was made to satisfy a delinquent assessment for opening and laying out a highway, etc., and the deed stated that the sale took place at an hour when, if it had taken place, it would have been invalid; and it was urged, among other objections, that this recital was fatal to the deed although the purchaser was able to prove that the sale took place at a proper hour. After discussing two other objections, Shepley, C. J., said: "The third is, that the lands were advertised for sale on October 9th, at eleven o'clock forenoon, and that the sale was made at ten o'clock of the same day, after waiting two hours. The treasurer recites in his deed to the purchaser, that they were advertised for sale at ten o'clock, and that he sold them at that time, after waiting two hours. The meaning is, that he waited two hours after ten o'clock, and then sold them. The recital in his deeds was evidently a mistake. Such recitals are not conclusive evidence of the facts therein stated. Nor will the sale be illegal by such misrecital, if it appear that the sale was, in fact, made at the time and place appointed."

It is held in *Gould v. Thompson*, 45 Iowa, 450, that an officer making a tax deed can not be permitted by false recitals therein to overthrow the records upon which it is based. It seems that a deed reciting the sale as having taken place on a certain day, when, in fact, it took place on a subsequent day, may be supported by proof that it was the custom of the officer making it to record all sales for delinquent taxes as of the day when the sales for the county for that year commenced: *Callanan v. Hurley*, 93 U. S. 387.

WAIVER OF DEED AS EVIDENCE.—Notwithstanding the fact that there may be a statute making a deed *prima facie* or conclusive evidence of the regularity of the proceedings, if the holder of such a deed goes into proof of the steps necessary to make the sale valid, he will be deemed to have waived the benefit of the presumption in favor of the deed: *Curtiss v. Follett*, 15 Barb. 337.

WHAT LAW CONTROLS.—It seems that the effect of a tax deed as evidence is to be determined by the law in force at the time when the sale was made. A statute passed subsequently can not make the deed evidence of title if it would not have been so at the time of the sale: *Norris v. Russell*, 5 Cal. 249; *Keane v. Cannoran*, 21 Id. 291. So where a statute making tax deeds evidence was passed after a certain sale, but before the deed was made it was held that its effect as evidence must be determined by the prior law: *Garrett v. Wiggins*, 1 Scam. 335. But in *Freeman v. Thayer*, 33 Me. 76, it was held that a statute of this sort merely prescribes a rule of evidence, and that the law in force at the time of the trial must govern. If the law in force at the time of the sale made the deed conclusive evidence of regularity in the proceedings, and a statute is afterwards passed, making such deeds *prima facie* evidence, but giving the purchaser a more efficient remedy for quieting his title,

the holder of such prior deed can not take advantage of the new remedy without waiving the conclusiveness of his deed: *Burrows v. Bashford*, 22 Wis. 103. The effect of the deed as evidence is to be determined, also, by the law of the state where the land lies. If the law of that state makes the deed *prima facie*, or conclusive evidence of compliance with the requirements of the statute, it will be so regarded in the courts of other states: *Watson v. Atwood*, 25 Conn. 313.

JACKSON v. CHURCHILL.

[7 COWEN, 287.]

DEMAND OF DOWER before action for it is unnecessary.

DEVISE IN LIEU OF DOWER, if accepted, bars dower.

TESTAMENTARY PROVISION DOES NOT BAR DOWER, if accepted, unless expressly given in lieu of dower, or unless the claim of dower is plainly inconsistent with the testator's intention.

DEVISE OF A DWELLING-HOUSE TO THE WIDOW of the testator, during life or widowhood, together with a bequest of certain household furniture and other property, the rest of the real and personal estate being divided among the testator's children, who were to aid in the widow's support, if she should request it, does not, if accepted, bar the claim to dower.

EJECTMENT for dower set off to the plaintiff's lessor as the widow of her late husband. The defendant objected that the dower should have been demanded before action, but the objection was overruled. The defendant then insisted that the claim to dower was barred by the widow's acceptance of a provision in lieu thereof under her husband's will. The will was given in evidence, and it appeared that the testator devised to his widow, for life, or during widowhood, his dwelling-house and a part of his gardens, and gave her certain cows, sheep, household furniture, etc., and that he divided his farm and the rest of his property between his two sons, one of whom was to keep his mother's stock, and the other to assist in her support if she should request it. The defendant offered to show that this provision had been accepted by the widow, but the evidence was rejected as immaterial, to which the defendant excepted. Verdict for the plaintiff, and motion for a new trial.

A. Loomis, for the motion.

N. S. Benton, contra.

By Court, SAVAGE, C. J. No demand of dower was necessary: 6 Johns. 295, 296; *Hitchcock v. Harrington*, 5 Am. Dec. 229. The location by the admeasurers is conclusive in this action: 17 Johns. 126.

Every married woman has an interest in the lands of her husband. Of this she cannot be divested but by her own act or con-

sent. If the husband make a provision for his wife, by will, in lieu of dower, she has her election to take the testamentary provision or to claim her legal provision. If she accept the provision in the will, she thereby relinquishes her dower. If the provision in the will is not expressed to be in lieu of dower, but is an ordinary legacy or devise, she is entitled both to her dower and to the provision by the will. But if the claim of dower is inconsistent with the will, and repugnant to its provisions, then we may infer an intention in the testator that the provision in the will should be in lieu of dower. In such cases, the widow must elect one or the other, but cannot have both; and if she enters upon the property given by the will, and enjoys it, she is thereby barred of her dower. This doctrine is nowhere contested; but there have been some apparent discrepancies in the English decisions, as to what constituted evidence of the intent of the testator. These cases are ably reviewed by the late Chancellor Kent, in the case of *Adsit v. Adsit*, 2 Johns. Ch. 450 [7 Am. Dec. 539]. In that case a bill had been filed to stay proceedings at law. The husband had directed his estate to be sold, agreeably to a contract he had entered into in his lifetime; out of which he gave several legacies, and five hundred dollars to his wife, to be left in the hands of his executors, and paid to her as she might need it. She accepted the legacy, but this was held no bar to her dower.

In the case of *Larrabee and wife v. Van Alstyne*, 1 Johns. 307 [3 Am. Dec. 383], the testator gave his wife certain articles and money, and declared "that this bequest and devise shall be understood in no other sense than to be in lieu and stead of every other claim and pretension my said wife can or may have on my estate." This was considered, by a majority of the court, a good bar in equity, if proof had been made of the payment of the money. Two of the judges thought the legacy a bar at law, but the defendant failed in his proof of payment.

In the case of *Van Orden v. Van Orden*, 10 Johns. 30 [6 Am. Dec. 314], an annuity was given to the wife by the will; and it was added: "It is, nevertheless, to be understood that the said annuity is in lieu of dower." This testamentary provision, it was said, would be a good plea in bar of her dower.

There are cases of a legacy expressly given in lieu of dower. The case of *Birmingham v. Kirwan*, 2 Sch. & Lef. 444, is more like the present. The testator devised his property to trustees, to sell or mortgage all except his demesne of one hundred and seventy acres, and gardens, which he directed to be occupied by his

widow during her natural life, upon a small rent, and keeping them in repair. Out of the property sold or mortgaged, he directed an annuity to his wife of two hundred pounds. The residue was appropriated to the payment of debts and legacies. The principal point was whether the widow should be entitled both to dower and to the provision in the will. Lord Redesdale decided that she was not precluded of dower in the lands not included in the devise in her own favor. He held it was not necessary to use express words of exclusion, in order to put the widow to her election. But that, as a person can not accept and reject the same instrument, if, from the whole taken together, it was the manifest intention that the testamentary provisions should be received in lieu of dower, and such provision had been accepted, it would bar the claim of dower. But the language of the will must not be ambiguous or doubtful. The chancellor held that the provisions of the will were not inconsistent with the right of dower in the lands directed to be sold.

In this case, the widow is, by the will, provided with a house and garden, some furniture, a servant girl, and with some stock. One son is directed to keep the stock, and the other to assist his mother, if she requests it; but no means are given her to compel compliance, if refused. There is, in this provision, nothing inconsistent with her claim of dower. The devise to the sons will be less valuable; but that constitutes no objection. There is no incongruity in enforcing the claim for dower, and the devise. The two may stand well together; and it may fairly be inferred that the testator intended the devise as additional to his wife's claim for dower. The same rule prevails in Pennsylvania: 1 Dal. 418; 1 Yates, 424 [*Evans v. Webb*, 1 Am. Dec. 308].

New trial granted.

DEVISE IN LIEU OF DOWER.—The cases in the American Decisions bearing on the question as to when dower will or will not be barred by a devise, legacy, or other provision in lieu thereof, are collected in the note to *Hall's case*, ante. The doctrine of the principal case, that, in order to bar the claim of dower by a testamentary provision, it must clearly appear that it is repugnant to the whole scope of the will, and to the testator's intention that the devise and claim of dower should stand together, is approved and followed in *Tobias v. Ketchum*, 32 N. Y. 326. But if such provision is intended and accepted in lieu of dower, the election thus made is irrevocable, and the claim of dower is barred, both at law and in equity: *Kennedy v. Mills*, 13 Wend. 556. The principal case is referred to as an authority on this point in *Charter v. Otis*, 41 Barb. 533. That ejectment will lie to recover dower after admission: see *Ellicott v. Mosier*, 11 Barb. 576, citing *Jackson v. Churchill*.

JACKSON v. HARSEN.

[7 COWEN, 323.]

RELATION OF LANDLORD AND TENANT once established, attaches to all who succeed to the possession through or under the tenant, either immediately or remotely.

PURCHASER FROM THE TENANT entering under an absolute conveyance in fee, is deemed to enter as the lessor's tenant, though he may not have known that his grantor derived possession from the lessor.

LEASE is a contract for the possession and profits of lands and tenements, with a recompense of rent or other income, or a conveyance to one for life, or years, or at will, with a reservation of rent or other like return.

IF NO RENT OR OTHER RETURN is reserved on conveying an estate for life, as where a tenancy for life is created by operation of law through the omission of words of inheritance in a conveyance, the conventional relation of landlord and tenant does not exist, and the grantee is not within the principle precluding a tenant from setting up any defense against his landlord.

ADVERSE POSSESSION CAN NOT BE SET UP BY A TENANT for life against the remainderman or reversioner.

AFTER THE TERMINATION OF THE LIFE-ESTATE, if the reversioner permit the representatives of the tenant for life to hold claiming as their own for the time prescribed by statute, the right of recovery is gone.

EJECTMENT for a lot in the city of New York. Verdict for the defendants, and a motion for a new trial. Several questions were raised in the course of the argument, but the only point considered by the court was that relating to the defense of adverse possession, the facts concerning which are stated in the opinion.

A. Burr and E. Williams, for the plaintiff.

P. W. Radcliff and S. M. Hopkins, contra.

By Court, WOODWORTH, J. In the view I have taken of this cause it is not necessary to discuss a number of questions raised on the argument. I am of opinion that the plaintiff is barred by reason of a valid adverse possession in the defendants. It appears that Arnaut Webber, from whom the lessors of the plaintiff deduced title, as his heirs at law, on the first of May, 1686, conveyed to Lawrens Colvelt all the right, title, and interest which he had by virtue of a transfer from Abraham Lambertson Mole, to a parcel of land in the city of New York, including the premises in question. The deed from Mole to Webber conveyed the premises in fee. From the words used in the deed to Colvelt, the intent evidently appears to have been to convey a like estate; but by omitting the usual words

of inheritance, it is contended that only a life-estate was granted. For the purpose of this decision it will be assumed that Colvelt acquired no more than a life-estate; and if so, the question is, whether the right of the reversioner and his heirs is barred by lapse of time. Colvelt by deed poll conveyed in fee-simple to William Merritt; the latter, on the tenth of May, 1698, granted in like manner to William Janeway, with full covenants. The title of Janeway, in 1731, became vested in Christopher Bancker. In 1747, a partition between Bancker and others was made by deed, whereby the premises in question were set apart and conveyed in severalty to John Roosevelt. From him they passed by will to his son, Cornelius Roosevelt. The latter, by will, dated the eleventh of February, 1771, authorized his executors to convey. On the twenty-second of July, 1774, they granted the premises to Johannes Becker, who, on the nineteenth of August, 1783, conveyed to John Peter Ritter. A deed of partition, dated April 30, 1814, between the children and heirs at law of Ritter, was executed, by which the premises were assigned to Joanna, the wife of Harsen, the defendant. On the eighteenth of May, 1814, Harsen and wife, for the consideration of twenty thousand dollars, conveyed to Jonas Mapes, who, the next day, reconveyed to Harsen. Possession followed these conveyances, with claim of title.

On these facts was it competent for the defendants to set up an adverse possession to bar the right of the plaintiff? It is contended by the plaintiff that the entry of tenant for life and his grantee can not form the basis of an adverse title, or adverse possession.

The law seems to be well settled that when the relation of landlord and tenant is established it attaches to all who may succeed to the possession, through or under the tenant, immediately or remotely. This was so held in *Jackson v. Davis*, 5 Cowen, 129 [15 Am. Dec. 451]. The doctrine is supported in numerous cases: 2 T. R. 53; 1 Id. 760, note; 1 Caines, 444; 2 Johns. Cas. 223; 3 Johns. 223, 499.

Where a tenancy exists, a purchaser who enters under an absolute conveyance in fee from the tenant is considered as entering as the tenant of the lessor, although he may not have known that his grantor held or derived his possession from the lessor: 5 Cowen, 130 [*Jackson v. Davis*, 15 Am. Dec. 451]. Can this be called a tenancy of that description? I have already observed that the conveyance of Arnaut Webber to Colvelt was intended as a grant in fee. It is not so merely by the omission of certain

technical words held necessary to constitute that estate. No lease of the premises was intended. No rents are reserved, no services to be rendered, or stipulation to be performed by the grantee. When speaking of the relation of landlord and tenant, what is understood? Woodfall, in his treatise (c. 1, sec. 1), has accurately defined the nature of this relation. He says: "A lease is a contract for the possession and profits of lands and tenements on the one side, and a recompense of rent or other income on the other; or it is a conveyance to a person for life, or years, or at will, in consideration of a return of rent or other recompense. The person letting the land is called the landlord; and the party to whom the lease is made, the tenant:" 2 Bacon, 558. In 2 Blackstone's Com. 120, the author observes that "estates for life expressly created by deed or grant, which alone are properly conventional, are where a lease is made to a man to hold for the term of his own life or that of any other person; in any of which cases he is styled tenant for life. They are held by such conventional rents and services as the lord or lessor and his tenant or lessee have agreed on." He further observes that "estates for life may be created, not only by the expressions before mentioned, but also by a general grant, without defining or limiting any specific estate, as if one grants to A. B. the manor of Dale. This makes him tenant for life." The grant here, if for life, is of the latter description. It is created by operations of law. No relation of landlord and tenant was contemplated. There are no covenants, conditions, rents, or services to bind the grantee to the grantor, so as to constitute the intimate relation that exists between landlord and tenant. There is no reason, therefore, in the nature of the case why the restrictions and disabilities that a tenant is under to his landlord should be applied, when the grantor conveys simply an estate for life. The established doctrine, that a tenant can not set up a title against his landlord by reason of the privity of estate, does not apply. If A. conveys to B. absolutely an estate for life, without condition, he, it is true, is tenant for life; for that is the technical description of that species of estate; but he is not a tenant to the grantor; nor is the grantor the landlord within the meaning of these terms. There are no reciprocal or other duties between them to be performed. The grantee has all the rights incident to an estate for life, and may exercise them without the let or hindrance of the grantor. He is not within the principle that precludes the tenant from setting up a defense against his landlord; but in this respect stands on the

same ground as if the purchase had been in fee. It is, therefore, a mistake to suppose that this case excludes the right of setting up an adverse possession, because the defendants derive title from Colvelt, he never having been the tenant of Arnaut Webber. So long as the life estate continued, the possession of the tenant for life was the possession of him in remainder or reversion, and during its continuance there could be no adverse possession. When that ceased, the right of entry accrued. If, after the termination of the life estate, the reversioner permits the representatives of the tenant for life to hold, claiming as their own, beyond the time limited for bringing actions, the right to recover is gone. I consider this proposition as settled law.

When the life estate ended rests on presumption. The utmost period of the ordinary existence of man may be allowed for its continuance. After that, there will remain more than half a century, during which the defendants, and those from whom they derive title, have been in the actual occupancy of the premises, claiming under paper title, and making transfers for valuable considerations. Whatever may have been the right, originally, of the ancestor of the lessor of the plaintiff, it is barred by an adverse possession of more than twenty-five years. The motion for a new trial must be denied.

New trial denied.

THE DEFINITION OF A LEASE, which will create the conventional relation of landlord and tenant, given in the above decision, is approved and adopted in *Strong v. Skinner*, 4 Barb. 558, and *Voorhees v. Presbyterian Church*, 5 How. Pr. 71. When such relation does exist, the tenant, as well as those coming into possession under him, is precluded from setting up any adverse claim to the land: *Jackson v. Jones*, 9 Cow. 192; *De Lancey v. Ganong*, 9 N. Y. 24, both citing the principal case. But it was held in *Christie v. Gage*, 71 Id. 194, on the authority of *Jackson v. Harsen*, that this principal would not prevent a grantee in fee of a tenant for life from setting up a claim by adverse possession, against the remainder-man or reversioner. It was held in *Evertson v. Sutton*, 5 Wend. 284, referring to the principal case, that the remedy provided by statute against tenants holding over, applied only where the conventional relation of landlord and tenant existed, and not where such relation was created by operation of law.

As to what agreements in particular cases constitute leases, see: *Smith v. Simons*, 1 Am. Dec. 48, and *Jackson v. Kisselbrack*, 6 Id. 341. The relation of landlord and tenant, it was held in *Little v. Libby*, 11 Id. 68, can not be created except by contract, express or implied; but when that relation is once created, as laid down in the principal case, it applies to all who succeed to the possession through or under the tenant: *Jackson v. Davis*, 15 Id. 451, and note. And the tenant and all who thus succeed him are estopped to deny the title of the landlord: *Camp v. Camp*, 13 Id. 60, and note; *Jackson v. Davis*, 15 Id. 451, and note. The tenant or sub-tenant must surrender pos-

session before setting up a claim to the land: *Blake v. Howe*, 15 Id. 681. If he set up an adverse claim without such surrender, after the expiration of the term, it will be deemed equivalent to a refusal to surrender, and he will be liable to an action for forcible entry and detainer: *Hoskins v. Helm*, 14 Id. 133.

JACKSON v. MCCHESENEY.

[7 COWEN, 360.]

ACKNOWLEDGMENT IN A DEED OF THE RECEIPT of the consideration is *prima facie* evidence of its payment, although it may be rebutted.

SUCH ACKNOWLEDGMENT DOES NOT OPERATE AS AN ESTOPPEL, but as evidence merely, tending to uphold the deed.

BONA FIDE PURCHASER.—Where, in answer to a bill to set aside a deed as fraudulent, the grantee alleges that he was a *bona fide* purchaser, without notice of the plaintiff's claim, he must aver and prove, not only that he made the purchase, but that he actually paid the purchase money before receiving notice of said claim.

IF THE MONEY WAS SECURED TO BE PAID, but not actually paid before notice, the defense will not be made out.

THE RULE IN EJECTMENT IS DIFFERENT, because there the strict legal title must prevail.

MORTGAGOR IS NOT A COMPETENT WITNESS for the mortgagee, in an ejectment brought against one to whom the mortgagor has quitclaimed the land.

WHERE A MORTGAGE IS UNREGISTERED, a *bona fide* purchaser from the mortgagor takes the land free of the incumbrance; so, also, his grantees who purchase after registration of the mortgage.

EJECTMENT. It appeared that on December 29, 1810, Hester Viele, one of the plaintiff's lessors, conveyed the land in question to one Groves, for an expressed consideration of two hundred dollars, and took back a bond and mortgage from Groves on the same day for the purchase money. The mortgage was not registered until June 3, 1811. In January, 1811, Groves conveyed by quitclaim deed to one Rufus Wright, from whom the defendant derived title by sundry mesne conveyances dated after registration of the mortgage. The conveyance to Wright, and the subsequent deeds, acknowledged payment of the consideration, but there was no other proof of payment. The plaintiff claimed that to make the grantees in the several deeds *bona fide* purchasers, actual payment of the consideration was necessary, but the judge ruled that the acknowledgments contained in the deeds were *prima facie* evidence of that fact. Groves, the mortgagor, was offered as a witness by the plaintiff to prove that Wright purchased with notice of the mortgage, but the judge excluded him on the ground of interest. The plaintiff further insisted that as the defendant and his grantors,

subsequent to Wright, purchased after registry of the mortgage, they were affected with notice of the lien, and bound by it, but the objection was overruled, and the plaintiff nonsuited. Motion to set aside the nonsuit on the points made at the trial.

D. Russell, for the motion.

S. Stevens, contra.

By Court, SUTHERLAND, J. The acknowledgment in a deed of a receipt of the consideration money is *prima facie* evidence of its payment. It is equivalent to, and like a receipt for money. It is liable to be explained or contradicted; but until impeached, it is legal and competent evidence of payment. Nor is its operation confined to the immediate parties to the deed. It does not operate by way of estoppel, but as evidence merely, and must have the effect of sustaining the deed, by establishing, *prima facie*, the consideration for which it was given, against any person who may seek collaterally to impeach it: *Kip's executors v. Denniston*, 4 Johns. 26; *Shepherd v. Little*, 14 Id. 210; *Thalhimer v. Brinckerhoff*, 6 Cowen, 102; 2 Phil. Ev. 62, note b.

Where a bill is filed to set aside a deed as fraudulent, and the grantee, in his answer, alleges that he was *bona fide* purchaser, without notice of the plaintiff's claim, he must aver and prove, not only that he had no notice of the plaintiff's rights before his purchase, but that he had actually paid the purchase money before such notice. Even if the purchase money be secured to be paid, yet if it be not in fact paid before notice, it will not sustain the plea of a purchase for a valuable consideration, without notice: 7 Johns. Ch. 68 [*Jewett v. Palmer*, 11 Am. Dec. 401]; 1 Atk. 68; 2 Id. 638; 3 Id. 304. But there is no analogy between those cases and an action of ejectment, where the strict legal title must prevail.

Groves, the mortgagor, had a direct interest in the recovery of the plaintiff. His conveyance to Wright was by a quitclaim deed, so that he was not responsible to him in any event. But if the lessors of the plaintiff should fail to recover the land, he would be liable to Hester Viele, the mortgagee, upon his bond. Should they recover, they might resort to the mortgaged premises, and he be relieved wholly or partially from payment. He was, therefore, properly rejected.

Rufus Wright, then, was a *bona fide* purchaser, without notice of the mortgage, and held the land discharged from its lien. And though the mortgage was subsequently registered, its lien was not thereby restored so as to affect subsequent purchasers.

Wright held the land discharged from the mortgage, and his grantees succeeded to all his rights.

The motion to set aside the nonsuit must, therefore, be denied.

Motion denied.

ACKNOWLEDGING RECEIPT OF CONSIDERATION IN DEED.—It was held in *Wood v. Chapin*, 13 N. Y. 509, on the authority of the foregoing decision that the acknowledgment of the receipt of the purchase-money in a deed is *prima facie* evidence that the grantee is a purchaser for value under the recording act as against a prior unrecorded conveyance. Jones, J., of the superior court of the city of New York, held, in *Bolton v. Jacks*, 6 Rob. 234, that the doctrine of *Wood v. Chapin* did not warrant the general position that such an acknowledgment was *prima facie* evidence of payment as against a person claiming adversely to the grantor, or under him by title prior to the deed containing the acknowledgment, except in a case under the recording act. He said: "The case of *Wood v. Chapin*, 13 N. Y. 509, it is true, holds on the authority of *Jackson v. McChesney*, 7 Cow. 360, that the clause in a deed acknowledging the payment of the purchase-money is *prima facie* evidence of the actual payment thereof, and sufficient (so far as the necessity of proving actual payment is concerned), if uncontradicted, to prove the grantee a *bona fide* purchaser within the meaning of the recording act. By referring to the case in Cowen we find that it asserts the proposition and relies for support on various cases which are cited. Upon looking at those cases, it will be found that the first two (14 Johns. 26 and 210) hold that the receipt in a deed stands on the same footing as any other receipt, and is, therefore, open to explanation; on the same principle the third case there cited (6 Cow. 102) holds that a receipt in a deed is *prima facie* evidence against the grantor (who by delivering the deed gives the receipt), that he received the money, precisely the same as any ordinary receipt would be *prima facie* evidence against the party giving it. These principles can only be made to sustain the proposition in question by the following train of reasoning: A receipt being *prima facie* evidence against the one giving it, and necessarily against any one claiming under him, subsequent to his giving it, and the first purchaser by neglecting to record his deed until after the second purchaser has recorded his, being regarded under the recording act as taking subsequent to the second deed, until he proves that the second deed was not made in good faith, and for a valuable consideration, he is (until he affirmatively disproves the facts, which give the second deed priority), considered as taking from the grantor, subsequent to the giving of the receipt in the first recorded deed; that receipt has the same effect against him as against the grantor, which is, that it is *prima facie* evidence of the payment of the money, subject to be explained or rebutted by affirmative proof. Having thus examined the foundation of the doctrine of *Wood v. Chapin*, for the purpose of ascertaining whether it compels me to hold that the consideration clause in a deed is *prima facie* evidence of actual payment, sufficient, if uncontradicted, to prove the grantor a purchaser for a valuable consideration, as against a person claiming either adversely to the grantor, or under him by title prior to the execution of the deed containing the consideration clause, in any case other than one arising under the recording act, I am satisfied that it does not.

Some doubt of the soundness of the general doctrine of the principal case on this point, in the broad terms in which it is stated, is expressed by Johnson, J., in *Peck v. Mallams*, 10 N. Y. 528, although he concedes the correctness

of the decision as applied to the particular facts of the case before the court. *Peck v. Mallams* was a suit to foreclose a mortgage, which, it was claimed, was not properly recorded; and one of the questions in the case was, whether or not a recital in a sheriff's deed of the same premises on a subsequent sale on execution against the mortgagor was sufficient *prima facie* evidence of payment to constitute the grantee a *bona fide* purchaser as against such mortgage. On this subject the learned judge said: "The only case which I have seen which seems to bear upon this point is *Jackson v. McChesney*, 7 Cow. 360. It was an ejectment brought upon a mortgage given by one Groves to the lessor of the plaintiff. Prior to the registry of the mortgage, and on the seventh of January, 1811, Groves quitclaimed to one Wright by a conveyance acknowledging the receipt of the consideration-money, about two hundred dollars. There was no proof of actual payment. The plaintiff insisted that such proof was necessary to protect the vendee as a *bona fide* purchaser. Walworth, C. J., held that the acknowledgment in the deed was *prima facie* evidence of payment. The supreme court held the ruling to be right." Then, after quoting the language of Sutherland, J., on this point in the principal case, the judge said: "I do not see, upon general principles, how the acknowledgment of a fact in a deed can be deemed evidence of the fact against strangers, and I feel almost as much difficulty in admitting that a recital in a deed can be evidence against one claiming under the same grantor by a prior title: Cowen & Hill's notes, 1236, and cases cited. This, I think, must be taken to be the utmost extent to which *Jackson v. McChesney*, can be conceded to go, for though the language of the learned judge is much broader, the case before him did not require anything more. *Kip v. Deniston*, 4 Johns. 26, holds that an acknowledgment in a conveyance by two trustees of the receipt of the consideration-money, does not render one responsible for the money received and misapplied by the other. *Shepard v. Little*, 14 Johns. 210, holds that the acknowledgment of the payment of the consideration in a deed does not preclude the party in an action to recover the consideration, but that he may by parol show it to be unpaid. *Thalhimer v. Brinckerhoff*, 6 Cow. 102, holds that the acknowledgment by an attorney of the receipt of the consideration-money in a deed executed by him as attorney, is *prima facie* evidence of the receipt of the money by the attorney. But I do not see that the doctrine of either of these cases goes at all to sustain the point to which they appear to be cited in *Jackson v. McChesney*. I do not think, therefore, that we have any authority for saying that in a proceeding in chancery to foreclose a mortgage, the recital in a sheriff's deed upon a sale on execution against the mortgagor on a judgment subsequent to the mortgage, is evidence of payment of the consideration against the prior mortgagee."

The decision of the subsequent case of *Wood v. Chapin*, 13 N. Y. 509, above referred to, seems to give full support to the doctrine of *Jackson v. McChesney*, on this point.

GRANTEE OF BONA FIDE PURCHASER.—The doctrine laid down in *Jackson v. McChesney*, that where one purchases land *bona fide*, and without notice of some prior lien or equity affecting the title, he will take the land discharged of the incumbrance, and a subsequent purchaser of his interest, though having notice of the prior claim, will nevertheless take the title clear of such claim, is approved and applied in *Sweet v. Green*, 1 Paige, 476, and *Varick v. Briggs*, 6 Id. 329. And on the other hand, a *bona fide* purchaser from one having notice of a fraud in a prior conveyance will be equally protected: *Somes v. Brewer*, 13 Am. Dec. 406; *Varick v. Briggs*, 6 Paige, 329.

PIXLEY v. WINCHELL.

[7 COWEN, 366.]

AFTER APPEARANCE BY THE DEFENDANT, the process will not be set aside even though it be void, and though the defendant appeared in ignorance of that fact.

MOTION to set aside the *capias ad respondendum*, and subsequent proceedings in this cause, after the defendant had put in special bail. The motion was based on the ground of an irregularity, which, it was claimed, rendered the process void, and of which the defendant and his attorney were ignorant, until the plaintiff filed his declaration. The defendant filed his motion the next term after the discovery.

G. C. Bronson, for the motion.

W. H. Maynard, contra.

By COURT. Without saying whether this writ is absolutely void, we are clear that it can not be set aside at this stage of the cause. The defendant has taken a step by which he is regularly in court, whether there be any process or not. We will not interfere, merely because the party acted in ignorance that the process was void.

Motion denied.

THAT APPEARANCE WAIVES ALL IRREGULARITIES in process made use of to bring a defendant into court, even though the party had no knowledge of the irregularities, is a point upon which the foregoing decision is frequently relied on as authority in the New York courts: *Barber v. Hubbard*, 3 Code Rep. 171; *Petrie v. Fitzgerald*, 1 Daly, 405; *Gardner v. Teller*, 2 How. Pr. 241; *Mulkins v. Clark*, 3 Id. 28; *Dix v. Palmer*, 5 Id. 234; *Col. Ins. Co. v. Force*, 8 Id. 354; *Webb v. Mott*, 6 Id. 441; *Hubbell v. Dana*, 9 Id. 425; *Coppernoll v. Ketcham*, 56 Barb. 113; *Ballouhey v. Cadot*, 3 Abb. Pr. (N. S.) 123.

EX PARTE WILLCOCKS.

[7 COWEN, 402.]

STATUTE EMPOWERING A COURT TO GIVE SUCH RELIEF as right and justice may appear to require, does not authorize an arbitrary determination, but a decision according to the legal rights of the parties.

MAJORITY OF THE DIRECTORS OF A CORPORATION must be present at any meeting to constitute a board competent to transact business, unless the charter gives that power to a less number.

TO MAKE A QUORUM of a select and definite body of persons possessing a power to elect, the general rule is, that a majority, at least, must be present, and then a majority of the quorum may decide.

TWO OF A BOARD OF NINE DIRECTORS of a corporation have not the power to hold a meeting, and to appoint inspectors of an election of directors.

DISTINCTION EXISTS BETWEEN A CORPORATE ACT to be done by a select body, and an act to be done by the constituent members; in the latter case a majority of those who appear may act.

HYPOTHECATION OF STOCK.—A by-law providing that a percentage of the stock of a member indebted to the corporation shall be deemed hypothecated, and held as security for the debt, does not constitute a hypothecation.

HYPOTHECATION IS CONVENTIONAL, and implies a power of selling the property to satisfy the debt on default of payment.

WHERE STOCK STANDS IN ONE'S NAME on the transfer-books, it is conclusive upon the inspectors as to his right to vote at an election of directors.

OWNER OF HYPOTHECATED STOCK may vote thereon.

INSPECTORS MAY BE CANDIDATES for directors at the election held by them.

MOTION to vacate an election of directors of the Utica Insurance Company, of which the relators were members. It appeared from the affidavits filed in support of the motion, that the inspectors who acted at the said election, were selected at a meeting at which only the president and another director were present, who appointed themselves, and one other director, as such inspectors; and that the full board was composed of nine members. It further appeared that there was a by-law of the corporation, providing that when a director was indebted to the corporation, eighty-five per cent. of his stock should be considered as hypothecated, and held as security, not transferable till the debt was paid; and that some four hundred and fifty shares of such stock were voted on at said election in favor of the successful ticket, by the persons in whose names it stood. Counter-affidavits were read, showing that the election was fairly conducted, and that the result was satisfactory to stockholders owning a majority of the stock.

D. B. Ogden and E. Williams, for the motion: 1. A minority of the board of directors of a corporation has no power to hold a meeting and appoint inspectors for an election of directors; 2. Stock hypothecated to the corporation under a by-law as security for a debt due the company, can not be voted on by the pledgor: *Ex parte Holmes*, 5 Cow. 426.

S. A. Foot Maynard and Talcott, Attorney-general, contra: 1. A majority of directors present at any meeting have power, under the statute, to transact business and bind the corporation; 2. If the appointment of inspectors in this case was void, the voters having attended the election and acquiesced in the appointment, such election was good because inspectors, though proper, are

not essential to the validity of an election; 3. The inspectors acted under color of authority. Hence their acts were valid as to third persons: 9 Johns. 135; 7 Id. 549; 4. If it were admitted that the hypothecated stock could not be voted on, the irregularity would not vitiate the election unless it could be shown that the exclusion of those votes would have changed the result: *Ex parte Murphy*, 7 Cow. 153; 5. There can be no hypothecation of stock by mere operation of a by-law; for a hypothecation must be conventional entirely; 6. Granting that this stock was hypothecated, those in whose names it stood might, nevertheless, vote on it, because there was no transfer of possession: 2 Bl. Com. 159.

By COURT. The affidavits in this case are very voluminous, and disclose the utmost fairness throughout the proceedings in question. The result probably accords with the wishes of those holding a decided majority of the votes. But these are considerations to which we can not advert, if there be lawful ground, however strict and technical, for saying the election was irregular. True by the ninth section of the act of 1825, we are to make such order and give such relief as right and justice may appear to require. But we can not pronounce on this right and justice arbitrarily. The statute means the legal rights of the parties.

By the third section of the act incorporating this company, the stock, property, estate, affairs and concerns of the corporation shall be managed and conducted by directors; and the fifteenth section is, that a majority present at a regular meeting shall be competent to decide on all business and concerns relating to the corporation. The original commissioners declared that the number of directors should be nine, and no alteration has since taken place in that respect. We must, therefore, assume this as the settled and definite number. Then did two of that number constitute a board for the purpose of doing any act regulating the election? We must take both parties as assuming upon these papers that inspectors were necessary. It would be violent to presume that the corporation intended to proceed without so usual, not to say necessary, organ of an election. The eleventh section of the act of 1825 supposes them to exist in every case. It was the business of the directors, as officers of the company, to see that these agents were properly appointed. In order to the transaction of this as well as other business, there must be a competent board. Whether we are to regard this as an electing power, or as part of the business of the direc-

tors in their regulations of the election, and, among other regulations, a designation of the persons who shall receive and canvass the votes; in either view we think there must, at least, a majority of the directors be present to constitute a board. Some statutes of incorporation declare expressly what number is necessary to make a board. Not so here. We do not understand the words, "a majority of the directors present shall be competent," etc., in the fifteenth section, as amounting to a declaration that a minority, however small, may decide. It leaves the number competent to a quorum, to be determined by the rules of the common law, which in no case of this kind is satisfied with less than a majority. If it be the exercise of the power to make by-laws, rules, or regulations, conferred upon them by the ninth section of the act of incorporation, the point is clear. They are prescribing a rule of conduct, and their acts are in the nature of legislation. The general rule also is, that to make a quorum of a select and definite body of men possessing the power to elect, a majority at least must be present; and then a majority of the quorum may decide. Here were but two out of nine directors. Not being a majority, the election must be set aside on that ground. The distinction is between a corporate act to be done by a select body, and one to be performed by the constituent members. In the latter case, a majority of those who appear may act.

Here we might stop. But it is important to any future election, that we should pronounce on the right to vote upon what is here called hypothecated stock. We do not consider it such, in virtue of the standing by-law which is admitted to exist under the tenth section; and which we believe is very common in the corporations of the state. Hypothecation is conventional, and implies the power of rendering the subject available by way of sale, to satisfy the debt on default of payment. The stock stood on the transfer books in the name of the voters. This is generally conclusive upon the inspectors; and we consider it so in the case.

But we do not hesitate to say that, in a clear case of hypothecation, the pledger may vote. The possession may well continue with him, consistently with the nature of the contract; and the stock remain in his name. Till enforced, and the title made absolute in the pledgee, and the name changed on the books, he should be received to vote. It is a question between him and the pledgee, with which the corporation have nothing to do. *Ex parte Holmes* has been relied on as governing this

case; but there the shares stood in the names of persons who were trustees for the corporation. They were designated as trustees. Literally, they might have voted; but we allowed it to be shown that they were trustees. To give the transfer books such a binding effect as to shut out all inquiry in every case, might enable the directors to control the election through the funds of the institution. We never intended by that decision to open an inquiry into every case of hypothecation.

N. B.—On an inquiry by the counsel for the present acting directors, whether it would be considered lawful for the inspectors to be candidates for the direction, the justices answered in the affirmative.

Rule: “That the election held upon the third day of July last, for nine directors of the Utica Insurance Company, be vacated and set aside; and that a new election for directors of the said company be held pursuant to the charter and by-laws of the said company; and that the same be held within thirty days.”

RECOGNIZED AS AUTHORITY on the following points: That it requires a majority of a select and definite body of persons to constitute a quorum: *People v. Walker*, 2 Abb. Pr. 425; S. C., 23 Barb. 308; but where a society or corporation is composed of an indefinite number, the rule of the common law is, that a majority of those who appear at a regular meeting constitute a body competent to transact business: *Field v. Field*, 9 Wend. 403; that a corporation has no concern with private agreements between holders of its stock and third persons: *Matter of Long Island R. R. Co.*, 19 Wend. 44; *Matter of M. & H. R. R. Co.*, Id. 146; that an appointment by a less number of persons than authorized is inoperative in a direct proceeding to vacate such appointment, but the appointees may, nevertheless, be officers *de facto*, whose acts will be good against collateral attack: *People v. Cook*, 14 Barb. 315, *per* Gray, J.; that the doctrine as to officers *de facto* applies only in favor of third persons, and not in a direct proceeding to try the title of such officers to their offices: *People v. Albany etc. R. R. Co.*, 55 Barb. 385; S. C. 1 Lans. 344; 7 Abb. Pr. (N. S.) 305; that a pledgor of hypothecated stock may vote thereon: *New York etc. R. R. Co. v. Schuyler*, 38 Barb. 542, *per* Ingraham, J., *arguendo*.

STONE v. WOOD.

[7 COWEN, 453.]

AGENT MUST CONTRACT IN THE PRINCIPAL'S NAME, or the latter will not be bound.

AGENT MUST SHOW HIS PRINCIPAL LIABLE upon a contract made by him or he will be himself liable thereon.

AGENT SIGNING AND SEALING A CONTRACT IN HIS OWN NAME is personally liable thereon, although he describe himself as agent.

COVENANT on a charter-party of affreightment. The defendant cravedoyer, and the instrument was set out on the record. It purported to be a "charter-party, etc., indented, etc., between Capt. Gyles P. Stone, part owner of the good ketch George, etc., whereof Gyles P. Stone is at present master, on the one part, and Timo N. Wood, as agents of J. & R. Raymond." The provisions of the contract are not necessary to be stated. It referred to Wood, the defendant, "as agent" throughout, and contained an agreement by the said Wood, "as agent," to pay a certain sum to the said Stone, in full, for the freight, etc. It concluded as follows: "To the true and faithful performance, etc., each of the parties before named binds and obliges himself, his executors, etc., in the penal sum, etc.

"TIMO N. WOOD. [L. S.]

"G. P. STONE." [L. S.]

The breach assigned was non-payment of the moneys stipulated to be paid to the plaintiff. Demurrer and joinder.

R. Sedgwick, for the demurrer.

P. A. Jay, contra.

By Court, SAVAGE, C. J. The question is whether the defendant is liable personally on this contract. That J. & R. Raymond are not liable on the contract, there can be no doubt. When an agent or attorney contracts on behalf of his principal, he must do so in the name of the principal, or the latter is not bound: *Combe's case*, 9 Co. 76, 77. When any one has authority to do any act it should be done in the name of him who gives the authority, not in the name of the attorney. All the subsequent cases agree in the law as thus laid down by Coke. There is no contradiction on the subject. The contract, then, not being made with the Raymonds, is it obligatory upon the defendant, or is it merely void?

The defendant describes himself as agent of J. & R. Raymond. Had the contract been in the name of the Raymonds, and by their authority, it would have been their contract; and there would have been no liability upon the agent.

But the agent, to excuse himself, should show a liability upon his principal, a doctrine which has been often recognized by this court: 13 Johns. 66; 19 Id. 63; [*Randall v. Van Vechten*, 10 Am. Dec. 193]; 1 Cowen, 536; [*Mott v. Hicks*, 13 Am. Dec. 550]. A leading case on this subject is *White v. Skinner*, 13 Johns. 307 [7 Am. Dec. 381]. In that case Platt, justice, who delivered the

opinion of the court, says: "The defendant represented himself, and assumed to act, as the agent of the directors of the manufacturing company. He is now sued in his private individual capacity; and to exonerate himself he was bound to aver and prove that he had authority to seal for his co-directors."

There are many cases which maintain the doctrine that recourse is to be had to the contract itself to ascertain whether credit was given to the principal or agent; and whether the agent intended to become personally responsible. Where credit is given to the agent, and where he evidently intended to be personally responsible, an action lies against him in his individual character: 15 Johns. 3; 1 T. R. 181. Whatever authority the signer may have to bind another, if he does not sign as agent or attorney, he binds himself, and no other person: 11 Mass. 29 [*Stackpole v. Arnold*, 6 Am. Dec. 150]. So also it is said: "If a factor enter into a charter-party with a master for freightment, the contract obliges him:" Molloy, 496; 2 Atk. 622. Generally speaking, an agent of the public, who contracts in his public capacity, is not personally responsible; but no doubt the contract may be so drawn as to make him liable personally, even in that case. In *Hodgson v. Dexter*, 1 Cranch, 345, the defendant covenanted as secretary of war, for himself and his successors; but the defendant in this case binds and obliges himself, his executors and administrators. There is no covenant on behalf of the Raymonds that they shall pay, but that the defendant, as their agent, will pay. The words "as agent" do not constitute the defendant the agent of the Raymonds. At most they are mere description. In *Appleton v. Binks*, 5 East, 147, the court said it was impossible to contend that when one covenants for another he is not bound by it, the covenant being in his own name, for himself, his heirs, etc.

In this case the covenant is the defendant's own. The case of *Frontin v. Small*, 2 Ld. Raym. 1418; and Str. 705, is supposed to establish the doctrine that all contracts made by an attorney in his own name are void. In that case the attorney undertook to lease property belonging to his principal, and executed the lease, not in the name of the owner, but in the name of himself; showing upon the face of the instrument that it conveyed nothing. There was, therefore, no consideration for the covenant to pay rent. The case of *Bogert v. Lussey*, 6 Johns. 94¹, was decided on the same principle. The attorneys had not executed a conveyance, but obligated themselves to do an act which they,

1. *Bogert v. De Bussey*, 6 Johns. 94.

and all parties concerned, knew would be void. The instrument itself was, therefore, held void. The present does not belong to that class of cases, but to those where the attorney assumes a personal responsibility in relation to the concerns of his principal, if the defendant is considered an attorney for the Raymonds; and if not, then the covenant is clearly his own. The plaintiff is entitled to judgment on the demurrer, with leave to amend.

Rule accordingly.

Sutherland, J., not having heard the argument, gave no opinion.

Recognized and followed as authority for the doctrine, that an agent, describing himself as such, but not signing the contract in the name of his principal, does not bind the principal by such contract, but is himself personally liable thereon, in *Barker v. Mechanics' Ins. Co.*, 3 Wend. 99; *Guyon v. Lercia*, 7 Id. 30; *Spencer v. Field*, 10 Id. 90; *Van Alstyne v. Van Slyck*, 10 Barb. 385; *DeWitt v. Walton*, 9 N. Y. 575. The doctrine of the principal case on this point is approved also in *Evans v. Wells*, 20 Wend. 338, *per* Edmonds, senator; *Townsend v. Corning*, 23 Id. 440; *Plumb v. Milk*, 19 Barb. 78; and *Bank of Genessee v. Patchin Bank*, 19 N. Y. 315. The addition of the word "agent," "receiver," or the like, to the name of a party, is regarded in law as merely *descriptio personæ*: *White v. Miles*, 11 How. Pr. 39. The fact that a person who signs a contract is not mentioned in the body of it is no objection to his being bound by it: *Decker v. Judson*, 16 N. Y. 447, *per* Paige, J., citing the principal case.

That a deed by an agent, unless signed in the principal's name, does not bind him: See *Locke v. Alexander*, 11 Am. Dec. 750, and cases cited in the note thereto. Trustees of a corporation, signing a note with their individual names, and affixing their individual seals, are personally liable thereon: *McClure v. Bennett*, 12 Am. Dec. 223.

AINSLIE v. WILSON.

[7 COWEN, 662.]

MORTGAGE NOT PAYMENT.—A mortgage given by an indorser to secure the indorsed note does not operate as payment, nor release him from liability, although it contain a stipulation against his personal liability.

INDORSER IS NOT AFFECTED BY THE MAKER'S DISCHARGE under the insolvent laws of this state, where he became chargeable on the note before such discharge, but did not pay the debt until afterwards.

FIRST INDORSER HAVING PAID A SECOND INDORSER a part of the debt and procured his release from liability, is not prohibited from maintaining an action against the maker by the fact that the note was subsequently sold and indorsed to another, who executed a release to the maker.

PAYMENT BY AN INDORSER BY CONVEYING LAND, which is received as pay-

ment, will support an action against the maker for money laid out, expended, etc.

PROPERTY PAID OR RECEIVED AS MONEY will support an action for money had and received, or money paid.

ASSUMPSIT brought by the payee and first indorser against the maker of certain notes. The declaration contained four counts, alleging in various forms that the plaintiff, having become chargeable as indorser on the said notes of the defendant, had paid one thousand two hundred dollars thereon to John and James B. Murray, who were indorsees and holders thereof. The fifth count was that the plaintiff, being liable as defendant's surety for certain debts, at his request conveyed his real estate, valued at one thousand two hundred dollars, in payment thereof. The sixth count was for money had and received, and money paid, laid out and expended.

It appeared at the trial at the circuit that on April 12, 1817, the defendant executed to the firm of Ainslie & Co., of whom the plaintiff was one, two notes for two thousand and fifty-nine dollars and thirty-five cents each, payable to their order, at six and four months, respectively; that the payees indorsed to Murray and son, and they to Isaac Bronson, and that payment was regularly demanded at maturity, and notice given to the indorsers. There was some question made as to whether the indorsement to Bronson was *bona fide* or collusive. On March 24, 1818, the plaintiff executed a mortgage on certain lots to the Murrays to indemnify them against liability on the said notes, with a proviso that the mortgagees should bring no action against the mortgagor on any implied covenants in the mortgage, but should resort to the mortgaged premises only for indemnity. On May 13, 1818, the Murrays paid Bronson the amount of the notes. On February 3, 1821, the plaintiff released to the Murrays the equity of redemption in said mortgaged premises, the Murrays receiving the same as payment of twelve hundred dollars on the plaintiff's indorsement, and releasing him from further liability. It further appeared on the trial that about May 13, 1818, the Murrays paid the amount of the notes to Bronson. On May 2, 1818, the defendant was discharged from his debts under the insolvent law of 1813, and was again discharged February 20, 1820, under the act to abolish imprisonment for debt. The defendant introduced in evidence a bill in equity duly sworn to and filed by the plaintiff March 3, 1818, against the Murrays and Bronson, alleging, among other things, that on January 24, 1818, the plaintiff

agreed and covenanted with the Murrays to convey to them certain lots, provided that within two days from that time they would pay him three hundred dollars, and release Ainslie & Co. from their indorsements; and further alleging that on January 28, 1818, the plaintiff tendered to the Murrays a duly executed conveyance of the lots, but they refused to receive it, or to pay the three hundred dollars, or to release Ainslie & Co. as indorsers. It further appeared that after the plaintiff executed to the Murrays the above-mentioned release of his equity of redemption in the said mortgaged premises, the Murrays sold the notes to one Hall, who released the defendant from all liability thereon. There was evidence showing that the lots mortgaged were subject to a prior mortgage, and there was some controversy on the point as to their value.

The defendant moved for a nonsuit against the plaintiff on the ground that the said mortgage was a payment constituting the plaintiff a creditor of the defendant, and this being before the discharge in insolvency, the claim was barred; that the proof varied from the special counts, in not showing any personal liability on the plaintiff when he released the equity of redemption, his personal liability having been taken away by the stipulation in the mortgage, and that the money counts in the declaration were not sustained, because there was no payment of money by the plaintiff. The motion was overruled by the circuit judge. Verdict for the plaintiff for eight hundred and four dollars and forty-five cents. Motion for a new trial based on a bill of exceptions signed by the judge.

C. Graham and G. Griffin, for the defendant.

R. Sedgwick and D. B. Ogden, contra.

By Court, WOODWORTH, J. There is no sufficient evidence to impeach the transaction between the Murrays and Bronson, as being *in fraudem legis*, or done with intent to defeat the operation of the defendant's discharge. But if it be conceded that the transfer to Bronson was collusive, and that the Murrays continued to be the real holders till after the defendant's discharge, it will not defeat the plaintiff's right of action, provided that, subsequent to the discharge, he, as first indorser, was liable to the Murrays, and actually made the payment in question.

The evidence sought to be derived from the bill in equity, I consider as irrelevant; for whatever may have been the equity between the plaintiff and the Murrays, it is a sufficient answer

here that no right of action could accrue to the plaintiff by reason of a contract which was not carried into effect. The Murrays refused to recognize the alleged agreement. It remained, therefore, unexecuted, and for this cause the plaintiff applied to a court of equity for relief.

The mortgage was a security merely, not a payment, and, therefore, did not place the plaintiff in a situation to demand anything of Wilson, the defendant. He had not, then, become a creditor of the defendant by taking up the notes, or paying any part, at the time of the discharge under the insolvent act of 1813, and could not be barred by it. Neither was the covenant in the mortgage an exoneration from liability as indorser of the notes. It left that liability as it found it, and merely provided against personal responsibility by reason of the mortgage, evidently meaning that the Murrays should avail themselves of nothing more than the lots.

According to this view, the plaintiff, having no cause of action against the defendant, at either of the times when he was discharged under the insolvent acts, is not affected by them.

The plaintiff's right of action, then, if any, arose upon his execution of his deed to the Murrays, on the third of February, 1821. The consideration of that deed was expressed at one thousand two hundred dollars, and it was received in payment of so much of the notes; that sum being the value of the lots as estimated by the Murrays. On the same day they executed to the plaintiff a writing, by which, for the consideration of this one thousand two hundred dollars, they released him from all further liability as indorser. The remainder due on the notes constituted a valid claim in favor of the Murrays, against Wilson, the maker. No money was paid as the consideration of the equity of redemption.

Hall's purchase and release of the notes to the maker, is wholly unimportant in respect to these parties. The Murrays, having received one thousand two hundred dollars of the indorser, discharged his liability only, and consequently, by a transfer of notes to Hall, he acquired the right of calling on the maker for the balance remaining due. The plaintiff's right rests on the claim of having paid the one thousand two hundred dollars previously.

There is some question whether the equity of redemption taken subject to the previous mortgage, was equal in value to the one thousand two hundred dollars. The jury found eight hundred and four dollars and forty-five cents only, and from the evidence, I think they were warranted in finding that amount.

The view which I have so far taken of the case, obviates the objections for variance between the special counts and the evidence. But if I am mistaken, then the point remains to be considered, whether the conveyance of land by a surety, to satisfy the money debt of the principal, will satisfy the money counts. It was not a voluntary payment, for the plaintiff was liable at the time to be prosecuted by the Murrays on the notes. He was originally liable, and continued so notwithstanding the mortgage, which was given as a contingent security to indemnify the Murrays, in case they should be compelled to pay. At the same time the Murrays were not the holders of the note; but Bronson. Whenever the indorser pays after he has been fixed, the liability of the maker commences. I have no doubt that, as the conveyance of the land was received in discharge of a money debt due from the plaintiff, it is, in judgment of law, to be considered the same thing as if the plaintiff had actually paid money. The Murrays received it as money, or an equivalent for money. They had the right of electing. To the defendant it was immaterial whether the payment was made in one way or the other. If an agent receives property for his principal, and there is no presumption that it has been converted into money, the action for money had and received will not lie; but if the agent appointed to collect a money debt should accept from the debtor in extinguishment property as money, he would not be permitted to question this form of action.

I am not aware that this express point has been decided. The authorities cited by the defendant's counsel do not, I apprehend, apply to the facts before us. In the case of *Taylor v. Higgins*, 3 East, 170, the plaintiff was surety for the defendant in a bond before his discharge under an insolvent debtor's act, and was afterwards obliged to give a new security by bond and warranty of attorney. It was held that the new security could not be considered as so much money paid to the defendant's use. In the case of *Cumming v. Hackley & Fisher*, 8 Johns. 202, the same doctrine is recognized. The question was, whether giving a bond in discharge of the liability of the plaintiffs as indorsers of two negotiable promissory notes drawn by the defendants was to be considered as payment of money, and it was held to be no payment; that the obligation to pay was not the same thing as payment. By the same case, it seems to be admitted that the giving of the negotiable paper would be considered equivalent to the payment of money; for otherwise a party might be obliged to pay a debt twice, if the paper should pass into the hands of an innocent indorsee. These cases go

very satisfactorily to show that the giving of the mortgage by the plaintiff did not give him a right of action, but leave the question, whether actual payment by the conveyance of land is sufficient to maintain the money count, undecided. And although it is said it must appear that money was actually advanced, the expression is to be understood that nothing short of actual payment will support the count. The mere extinguishment of the original liability by way of new security will not avail. In the case of *Randall v. Rich*, 11 Mass. 494, this question has been considered. A negotiable promissory note was indorsed to a lessor, as collateral security for the rent of the premises. The lessor commenced an action on the note, and caused an execution to be levied on the debtor's land. In an action by the lessee for money had and received, he was held entitled to recover the balance of the note, after deducting the rent in arrear. The court observed, that "the satisfaction of the execution ought to be considered as a payment of the debt in money, and although land is taken, it is taken at money's worth; and the debt, which might have been exacted in money at all events, has been discharged."

My opinion is that the motion for a new trial be denied.

Motion denied.

SUTHERLAND, J., not having heard the argument, gave no opinion.

FREQUENTLY CITED AND RELIED ON as an authority for the general doctrine that where land, or any other property or thing, is conveyed and received as payment in lieu of money, in the case of sureties, indorsers, or others, a count for money paid or money had and received, will be supported: *Stewart v. Conner*, 9 Ala. 813; *Huckabee v. May*, 14 Id. 267; *Redfield v. Haight*, 27 Conn. 40; *Gordon v. Camp*, 2 Fla. 428; *Marine Bank v. Rushmore*, 28 Id. 477; *Helvey v. Board of Commissioners*, 6 Blackf. 318; *Kneeland v. Fuller*, 51 Me. 521; *Lord v. Staples*, 23 N. H. 457; *Mathewson v. Powder Works*, 44 Id. 292; *Hoyt v. Hoyt*, 16 N. J. L. 144; *Allen v. Brown*, 44 N. Y. 233, per Hunt, C.; *Van Ostrand v. Reed*, 1 Wend. 430; *Bonney v. Seely*, 2 Id. 482; *Lewis v. Lozee*, 3 Id. 82; *Gilchrist v. Cunningham*, 8 Id. 644; *Rodman v. Hedden*, 10 Id. 501; *McCrea v. Purmort*, 16 Id. 477, per Cowen, J.; *Clark v. Fairchild*, 22 Id. 584; *Gregory v. Mack*, 3 Hill, 384; *Artcher v. McDuffie*, 5 Barb. 155; *Beals v. See*, 10 Pa. St. 60; *Grosholtz v. Stifel*, 4 Phila. 16; *Pratt v. Trunick*, 2 Pittsb. 293; *Hulett v. Soullard*, 26 Vt. 298; *Barrett v. Koeller*, 5 Biss. 42. The case is also referred to as authority on the following points: That to support an action for money had and received, it is only necessary to prove the plaintiff's title and the defendant's possession: *Merchants' Bank v. Rawls*, 7 Ga. 196; that the holder of negotiable note, whether by delivery or indorsement, is entitled to recover on the money counts: *Frazer v. Carpenter*, 2 McLean, 237; that an indorser may, if the exigency of business requires it, take up a bill or note and prosecute the prior parties to it, one or all: *Corey v. White*, 3 Barb. 13.

AYMAR v. BEERS.

[7 COWEN, 705.]

CONSIDERATION OF A BILL IS NOT MATERIAL to the question, whether there was due diligence in presenting it, if it appears *prima facie* to have been drawn for a lawful consideration.

BILL PAYABLE A CERTAIN PERIOD AFTER SIGHT should be presented for acceptance in a reasonable time, to charge the drawer.

WHAT IS REASONABLE TIME IS A QUESTION OF LAW when there is no dispute about facts.

WHERE A BILL HAS NOT BEEN NEGOTIATED, less latitude is allowed, as to time for presentment, than where it has been put in circulation.

QUESTION OF DUE DILIGENCE AS TO PRESENTMENT depends upon the facts of each particular case.

SICKNESS OF PAYEE, who is to be the bearer of a bill, he being at a distance from the drawee, and disabled by such sickness from presenting it, will excuse some delay.

TWENTY-NINE DAYS AFTER DATE do not constitute unreasonable delay in presenting a bill payable three days after sight, where the payee, being the bearer, is at a distance of three hundred miles from the drawee, and is prevented by severe illness from presenting it sooner.

UNDERSTANDING THAT PAYEE IS TO BE THE BEARER of such a bill may be proved, for the purpose of explaining delay in presenting it.

ASSUMPSIT against the drawer of an inland bill of exchange. The bill was drawn by the defendant, dated at New York, December 12, 1822, directed to Abbott & Co., of Richmond, Virginia, and payable to the order of John Bassett three days after sight, and was indorsed by John Bassett to George W. Bassett, and by him to the plaintiffs; but it was admitted that John Bassett was still the real owner, and that the action was for his benefit. The bill was presented for acceptance January 10, 1823, but the drawees declined to accept it, when it was protested for non-acceptance, and notice given to the drawer. It was presented for payment, January 14, 1823, protested for non-payment, and notice thereof given. Evidence was offered by the plaintiffs as to the consideration of the bill, and also to explain the delay in presenting it, etc., but it was rejected by the judge at the circuit. The nature of the evidence sufficiently appears from the opinion. The circuit judge nonsuited the plaintiffs. Motion to set aside the nonsuit, and for a new trial.

J. Anthon, for the plaintiffs.

Clisbee and G. Griffin, contra.

By Court, **WOODWORTH, J.** Evidence was offered at the trial to prove that the payee was a farmer in Virginia, and had

brought to the city of New York a cargo of wheat, which the defendant had sold; and that the bill was given for the balance of the net proceeds. This was objected to, and overruled by the judge. The decision was correct. The bill not appearing to have been drawn for an unlawful consideration, but *prima facie*, for a valid one, the defendant was liable as drawer, in case of a demand within a reasonable time, and non-payment, accompanied with notice to the drawer. It is on this ground that the right to charge the defendant is claimed; and, therefore, whether the bill was given for the consideration stated, or any other good cause, the result would not be varied.

It appeared in evidence, that on the tenth of January, 1823, the bill was presented for acceptance, which was refused; and on the same day, notice of non-acceptance was sent by mail to the defendant.

On the fourteenth of January, 1823, the bill was presented for payment. It was not paid, but protested for non-payment. Abbott & Co., the drawees, failed to meet their engagements on the day the bill was presented, and were supposed to be insolvent. John Bassett, the payee, resided at Hanover, about twenty miles from Richmond, Virginia. When he returned home from New York, which was between the first and sixth of January, 1823, he had the draft in his possession. The delay in presenting the bill after Bassett returned, was in consequence of ill health. In traveling from New York directly to his residence in Hanover, the distance is about twenty miles less than to pass through Richmond.

The defendant moved for a nonsuit, which the judge said he should order, unless further evidence was produced.

The plaintiff then proved that the payee was in New York in December, 1822; and had dealings with the defendant, who had funds of his in his hands. That he was in the defendant's counting-room on the thirteenth of December, 1822, and said he intended to depart for his residence on the fourteenth. He was then laboring under a bad cold and asthma.

The plaintiff offered to prove that it was understood between the parties that the payee was to carry the bill with him; but the evidence was excluded.

The counsel for the plaintiffs insisted on their right to go to the jury, on the ground that the question of due diligence was for their consideration, under the direction of the judge; but he decided that it was a question for the court, when the facts are not disputed; and ordered a nonsuit.

It will be conceded that if a presentation for acceptance was not made within a reasonable time, and notice given of non-acceptance, the defendant is discharged. The material questions, then, are: 1. Is the court to decide whether there has been reasonable diligence, or is it the right of the jury? 2. If the latter, then a new trial must be granted, because the question has not been disposed of by the proper forum. But if the former, then we are called on to decide whether, under the circumstances, the delay was unreasonable.

It is scarcely necessary to remark on the importance of certainty to the commercial world, in all questions relating to bills or notes; and it is equally obvious that if the jury are to decide on this question, conclusions may be expected to vary on substantially the same state of facts. I should be unwilling to sanction such a doctrine, unless required by a well settled course of decisions. I am aware of no exceptions to the rule, that when there is no dispute about facts, it is the business of the law to declare what shall be their effect. A bill, payable a certain number of days after sight, is analogous to a promissory note payable on demand, so far as respects the use of due diligence. In both cases, an unreasonable delay will exonerate; in the former an indorser, in the latter a drawer. These cases are distinguished from notes or bills having a certain number of days to run. There, by repeated adjudications, the law has accurately defined within what time a demand shall be made, and notice given. The omission to pursue the course prescribed is at the peril of the holder. The question of reasonable diligence does not seem to be open. Anything constituting a legal excuse in such a case, must generally be derived from the act of the party to be charged, showing that he has directly or impliedly consented to release the rule regulating demand and notice. With respect to bills payable after sight, or notes on demand, when the action is to charge the drawer or indorser, no specific general rule, so far as I can discover, having been laid down in the books, other than that reasonable diligence must be used, we can not expect to find anything more than decisions on particular cases, upon questions whether they constitute reasonable diligence or not. So far as they go, the law may be considered as reduced to certainty; and a similar rule will be applicable to similar cases. But when a new case arises, where the facts are essentially variant, the court are then to resort to the general principle; and adjudge whether the new case is fairly within its operation. Indeed, it is apparent

that a rule limiting the demand, in all cases, to a certain number of days, on bills after sight, and notes on demand, would be arbitrary and inconsistent with a consideration of the question of due diligence, which implies the exercise of some discretion, varying according to the features of each particular case. The discretion to be exercised is a legal one, governed by the principle that reasonable diligence shall be used; and disposing of the question presented by the given case, according to the just principles resulting from the rules. If this is not a mistaken view, it will be seen how foreign the question is from the duties of a jury, who are to pronounce on facts only, unless the law and the fact are so blended that they must necessarily pronounce on both. In such cases, however, they can not usurp the legitimate power of the court; a verdict against the law arising on the facts found by them being liable to be set aside.

On this question, I apprehend our courts have held a uniform language. It is the same as that of Lord Mansfield, in *Tindal v. Brown*, 1 T. R. 163: "What is reasonable notice is partly a question of fact, and partly a question of law. Wherever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to for the sake of certainty." In *Furman v. Haskin*, 2 Caines, 372, the court say: "What is a reasonable time is a question of law, if the facts be agreed on;" the rule I take to be universally applicable, as well to bills at sight as others. That case arose on a note payable on demand. Our courts have adhered to this rule. In England, it is admitted to be fluctuating. There seems to have been a departure from the doctrine of Lord Mansfield; for in *Muilman v. D'Eguino*, 2 H. Bl. 569, Eyre, C. J., says: "It must always be for the jury to determine whether any laches is imputable to the plaintiff;" and in *Fry v. Hill*, 7 Taun. 398, it is said by Gibbs, C. J.: "It would be a question for the jury, whether there has been a default to present the bill within a reasonable time." The rule is commented on in *Darbshire v. Parker*, 6 East, 3; and not definitely settled.

The remarks of Lord C. J. Willes in *Bell v. Wardell*, Willes, 204, where a custom was pleaded for the inhabitants of a town to walk and ride over a certain close at all reasonable times, were, that what was deemed a reasonable time was considered to be a question of law arising out of all the circumstances. He observes the court were the proper judges; "for what is contrary to reason can not be consonant to law, which is founded on reason; and, therefore, the reasonableness in these and the

like cases depends on the law, and is to be decided by the judges."

The rule rests on this ground with us, and ought not to be disturbed.

The next question is, Has there been unreasonable delay?

In the case of *Robinson v. Ames*, 20 Johns. 146 [11 Am. Dec. 259], the action was against the defendant as drawer of a bill of exchange in Georgia, dated the sixth of March, 1819, upon Townsend and White, in New York, payable sixty days after sight to Starr and Ross or order; by whom it was indorsed to the plaintiff. The bill was presented for acceptance on the twentieth of May, 1819, which was refused and notice given. One question was, whether the bill was presented in due time. The question was ably examined by Chief Justice Spencer. He observes that where a bill of exchange has been drawn payable at sight, or any specified number of days after sight, there is no definite or fixed rule when the bill shall be presented for acceptance other than this: that due diligence must be used, and that with respect to such bills, and particularly where they are negotiated by the payee, there is much more latitude as to the time of presentment than where the bill has a fixed period of payment.

The bill in this case was not negotiated, or put into circulation by the payee, although it was indorsed by him. He did not part with his interest in the bill; and therein the cases are distinguishable. Had the bill been put in circulation, probably the question of laches could not have arisen; for, in the case just cited, seventy-five days had elapsed before presentment, and yet held there was no unreasonable delay. Although less latitude is allowable on bills not negotiated, yet it is manifest that some indulgence is allowed; and, as appears from the case of *Muilman v. D'Eguino*, the courts had been very cautious in fixing any time for an inland bill, payable at a certain period after sight, to be presented for acceptance. This difficulty must always exist, when it is considered that the drawer of a bill payable after sight has himself fixed no period for presentment, but left it to be governed by the circumstances of the case.

In the case of *Field v. Nickerson*, 13 Mass. 131, the action was by the indorsee against the indorser of a note payable on demand. A delay of eight months was held unreasonable. The court considered a note payable on demand like a bill payable at sight; that in the latter case the holder must present his bill for acceptance within a reasonable time in order to charge the

drawer; and in the former, the indorsee must make a demand within a reasonable time in order to charge the indorser; that the time may vary according to the circumstances and situation of the parties. The same rule is recognized in *Losee v. Dunkin*, 7 Johns. 70 [5 Am. Dec. 245]. It was held in that case that there is no precise time at which a note payable on demand is to be deemed dishonored. Two months and one day had elapsed before the indorsement was made. It was held that the maker might show payment to the payee. The decision seems to be placed on the ground that no particular circumstances were disclosed in the case; and, therefore, they could not say that it was erroneous to let in the defense. In *Sice v. Cunningham*, 1 Cowen, 397, this court held that what is a reasonable time is a question of law to be decided by the court; and that five months was an unreasonable delay where all the parties resided in the same city.

If no particular circumstances had been stated in this case, I should incline to think there was unnecessary delay; but even then, it may be observed that in the cases reported, where the delay was held unreasonable, a much longer time had intervened. Here were only twenty-nine days intermediate the date and presentment; and it may be inferred that an immediate transmission of the bill by mail was not contemplated. The payee resided in Virginia, and was about returning immediately after the bill was drawn. He resided within twenty miles of the drawee's. It is more reasonable to suppose that the payee was to have been the bearer of the bill. He might not incline to risk the conveyance by the mail, or transfer the bill to a correspondent in Richmond; or he may not have known a proper person to whom to commit the trust. Be this as it may, it seems to me that in the payee's situation the law did not impose on him the necessity of forwarding by mail, or sending a special agent.

The question, then, of due diligence turns on the particular circumstances disclosed. The only facts of importance that enter into this view of the case are that the payee, being at the distance, say, of three hundred miles or more from Richmond, when he received the bill, was at the time afflicted with a violent cough and asthma, to which he had long been subject. George W. Bassett testified that after the payee had returned home, he was prevented by ill health from presenting the bill; and that he was confined to his house by sickness between the third and tenth of January, 1823, having a violent cold ap-

proaching to pleurisy. From the state of his health, it may well be presumed that he was retarded in his journey. If he left New York the thirteenth of December, and arrived at home January 1st, there are sixteen days, a period unnecessary for a man in health; but it can not safely be affirmed that a person laboring under a severe disease, would not require that length of time. I think this fact is a sufficient answer to the objection of unnecessary delay in proceeding from New York to Virginia. While at home he was disabled by sickness, and within a few days deputed George W. Bassett to transact the business for him. I can not say he delayed unreasonably, nor can I impute laches that will exonerate the drawer.

Chitty, in his treatise on Bills, 179, or Phil. ed. 1821, page 212, lays down the rule that the neglect to make a presentment at a proper time may be excused by illness, or other reasonable cause or accident not attributable to misconduct of the holder. All the authorities admit that the circumstances of the case may be looked into and considered; and if so, I am of opinion that in this case there are no sufficient grounds to exonerate the drawer.

It is proper to add that the evidence offered of its being understood between the parties that the payee was to carry the bill with him, should have been admitted. If there was such an understanding, it goes to fortify the conclusion that there was due diligence, inasmuch as it waived the more expeditious mode of conveyance by mail, and risked the delay to which the payee might be exposed.

The nonsuit must be set aside, and a new trial granted; the costs to abide the event.

Motion granted.

SUTHERLAND, J., not having heard the argument, gave no opinion.

REASONABLE TIME, WHEN A QUESTION OF LAW.—When an act is required or permitted to be done within a reasonable time, it has been the cause of much perplexity to the courts to determine whether the question, “What is a reasonable time?” is one of law or one of fact. Undoubtedly it is highly desirable that the court should decide the question as one of law, where it can be done without trenching upon the province of the jury in determining mere matters of fact, in order to secure uniformity and certainty in the adjudication of causes. Besides, the question seems, in its very nature, to be one which the court is better fitted than a jury to decide. “Reasonable time,” says Coke, “shall be adjudged by the discretion of the justices before whom the cause dependeth; and so it is of reasonable fines, customs, and services, upon the true state of the case depending before them; for reason-

ableness in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices. *Quam longum esse debet non definitur in jure, sed pendet ex discretione justiciariorum.* * * * Nothing that is contrary to reason is consonant to law:" Co. Lit. 56 b.

The great difficulty is that this question is generally found so complicated with the peculiar facts of each case that it is often impossible to separate it, and so, from necessity, the whole matter is left to the jury. Where, however, from the simple, clear, and undisputed state of the facts, or from the similarity of the case to others which have been decided, the court can determine the question as it does other legal questions, by the application of settled principles and general and uniform rules, it ought to do so. The rule is well stated by Mr. Chief Justice Currey, in *Luckhart v. Ogden*, 30 Cal. 547, where, after quoting some remarks of Starkie on Evidence on this subject, he says:

"The term, reasonable time, is a technical and legal expression, which, in the abstract, involves matter of law as well as matter of fact. Whenever any rule or principle of law applies to the special facts proved in evidence, and determines their legal quality, its application is a matter of law. But whenever the special facts and circumstances are such that the court cannot, by the aid of any legal rule or principle, decide upon the legal quality of the facts, it is necessary that the jury should draw the inference in fact, with reference to the ordinary course and practice of dealing, and the general principles of morality and utility. Where the law itself prescribes what shall be considered to be reasonable time in respect to a given subject, the question is one of law, and the duty of the jury is confined to finding the simple facts. Where, on the other hand, the law 'does not, by the operation of any principle or established rule, decide upon the legal quality of the simple facts, or *res gestæ*, it is for the jury to draw the general inference of reasonable or unreasonable in point of fact. In such cases, the legal conclusion follows the inference of facts; in other words, the question as to reasonable time, etc., is one of fact, and the time is reasonable or unreasonable in point of law, according to the finding of the jury in point of fact:' Starkie on Ev. 774."

The rule of Starkie, which is made the basis of this opinion, seems not to have met the entire approval of Shepley, J., in *Howe v. Huntington*, 15 Me. 354. After referring to the doctrine of Lord Mansfield, in *Tindal v. Brown*, 1 T. R. 167, as quoted in the principal case, Judge Shepley says:

"Starkie endeavors to state the distinction between the duties of the court and of the jury, in deciding upon this question, and says where the law does not, by the operation of any principle or established rule, decide upon the legal quality of the simple facts, it is for the jury to draw the general inference of reasonable or unreasonable: 1 Stark. Ev. 455. It is obvious that many of the cases would not be found to conform strictly to this rule. Its effect would be, in some measure, to relieve the court, while it would hardly carry out the design of Lord Mansfield in having rules established in all practicable cases by the court, for the purpose of affording settled rules by which to be governed. It has evidently been the desire of the courts to decide themselves, where they could do so upon any rule which might become certain, and furnish a precedent for future cases. And it is in this way that the law in relation to demand and notice upon bills and promissory notes has become so well defined and exact. Where there is no certain time limited, within which or from which the act is to be done, but it is to be accommodated in some degree to the interests of the party and the course of trade, as

in the case of bills at sight or notes on demand; or where it may in some measure depend upon the state of the weather, as in the case of removal of goods distrained, or the tithe crop, it has been left to the jury to decide upon each case as it arises. Where there is a certain epoch after which the act is to be performed, as soon as it may be conveniently, without regard to one's interest, or to the course of trade, or to other matters not within the control of human agency, the court may be able to come to a satisfactory conclusion for itself, without the assistance of a jury."

Another statement of the principles by which the nature of this question is to be ascertained, is contained in the opinion of Hubbard, J., in *Spoor v. Spooner*, 12 Met. 284. He says:

"The question of reasonable diligence in relation to a given subject is often one of difficulty, until, from the frequent recurrence of similar facts in the trial of causes, a settled rule of law is established, as in questions of notice upon bills of exchange and promissory notes. Lord Mansfield held that 'what is reasonable notice is partly a question of fact and partly a question of law. It may depend,' he said, 'in some measure on facts, such as the distance at which the parties live from each other, the course of the post, etc. But whenever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to by every one, for the sake of certainty:' *Tindal v. Brown*, 1 T. R. 168. So, also, as to contracts, where something is to be performed, and the contract is silent on the subject, what is a reasonable time for its performance is held to be matter of law: *Atwood v. Clark*, 2 Greenl. 249. And so, where the facts are agreed, reasonable time is matter of law. But where the facts are controverted, and the motives of the parties are involved in the question, there reasonable time is a question for the jury: *Hill v. Hobart*, 16 Me. 164; *Ellis v. Thompson*, 3 Mees. & W. 445. In the case at bar, the facts were in dispute, and the conduct of the several parties was to be considered, and we are of opinion that the question of the plaintiff's negligence, under all the circumstances in evidence, was properly submitted to the jury."

It is thus seen that the rule of decision here adopted in that case was practically the same as that followed in the other cases referred to. Indeed, it will be observed that in all the rules which have been laid down on this subject, the essential elements are the same. If the question of reasonableness of time in any particular case can be decided according to settled legal principles, without passing judgment on the facts, it is for the court to determine it; otherwise, it must be left to the jury, with proper instructions.

APPLICATION OF RULE TO NEGOTIABLE INSTRUMENTS.—The question as to what is reasonable time arises most frequently in determining whether or not there has been due diligence used with respect to presentment on bills and notes payable in a certain number of days after sight or demand. Although in this class of cases the question is sometimes submitted to the jury as one of fact, the courts manifest a strong inclination, generally, to treat it as one of law for the sake of that uniformity of decision which is so necessary in all questions of commercial law. The rule laid down in 1 *Parsons on Notes and Bills*, 340, is this: "Where the facts are few and simple, and the acts or admissions of parties clear and unequivocal, the question is one of law for the court. But where the rights and liabilities of parties on contracts, and a variety of transactions and dealings arising therefrom, or where the facts are contradictory and complicated, it is a question for the jury to determine."

In *Mullick v. Radakissen*, 28 Eng. L. & Eq. 86, Parke, B., delivered the opinion of the court, speaks of this question as a mixed one of law and fact.

He says: "In some foreign nations, it is provided for by positive enactments, fixing the times of presentment with reference to the places where the bill is drawn, and where the drawee resides, as in the French *Code de Commerce*, lib. 1, part 8, sec. 11. But in our law, there being no such fixed limit by enactment, where there is no usage of trade to fix the time, it has long been established that such bills must be presented in a reasonable time; which is a mixed question of law and fact, for determination of jury, with the assistance of a judge, where trial by jury exists, and for the determination of the court, where they exercise, as they do in Calcutta, the functions of a jury, as well as those of judges. The rule is adopted for want of a better, our law not defining the time precisely." To the same effect is *Mellish v. Rawdon*, 9 Bing. 423. The rule laid down by Bigelow, J., in *Prescott Bank v. Caverley*, 7 Gray, 217, is very similar in its terms. He says: "Ordinarily, the question whether a presentment was within a reasonable time is a mixed question of law and fact; to be decided by the jury under proper instructions from the court. And it may vary very much, according to the particular circumstances of each case. If the facts are doubtful, or in dispute, it is the clear duty of the court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the court to determine whether the reasonable time required by law for the presentment has been exceeded or not: *Gilmore v. Wilbur*, 12 Pick. 124; *Holbrook v. Burt*, 22 Id. 555; *Spoor v. Spooner*, 12 Met. 285." This is the rule adopted by Mr. Daniel: 1 Dan. on Neg. Inst. sec. 466.

Mr. Byles, speaking on this subject, says: "What is a reasonable time seems to be a question of law:" Byles on Bills, 163. Mr. Edwards, also, says, on the authority of the principal case and some others which have followed it, that in New York "the question is considered one of law, to be decided by the court; and where the facts are not disputed, this seems to be the general doctrine in similar cases:" Edw. on Bills, 391. And undoubtedly the rule laid down in the principal case on this point has been generally followed and approved by the New York courts: *Mohawk Bank v. Broderick*, 10 Wend. 304; *Gough v. Staats*, 13 Id. 549; *Smith v. Janes*, 20 Id. 192; *Elling v. Brinckerhoff*, 2 Hall, 459, 463; *Vantrot v. McCulloch*, 2 Hilt. 272; *Middletown Bank v. Morris*, 28 Barb. 616.

In Pennsylvania the cases have not been uniform. In *Brenzer v. Wightman*, 7 Watts & S. 264, Sergeant J., speaking of a case where notice of dishonor was required to be given to an indorser within a reasonable time, used the following language: "There is certainly a discrepancy to be found in the reported cases in this state on the question whether the reasonableness of notice to an indorser of the non-payment of the promissory note or bill of exchange is a question for the court or for the jury; and the same remark may be made on the older cases on this subject in many of the other states of the Union and in England. But the doctrine seems now to be settled, as a rule of commercial law, that where the facts are ascertained or undisputed, what shall constitute due diligence in communicating notice of the dishonor of a bill or note is matter of law: *Bank of Columbia v. Lawrence*, 1 Pet. 578; *Aymar v. Beers*, 7 Cow. 105; 8 Johns. 173; 11 Id. 231; 10 Mass. 84; 3 Marsh. 264; Chitty on Bills, 366. And of late this court has adopted the same principle, considering it of the first importance that the commercial law should be everywhere the same."

Mr. Justice Story, in *Wallace v. Agry*, 4 Mason, 345, following the doctrine of *Muilman v. D'Equino*, 2 H. Bl. 565, and *Fry v. Hill*, 7 Taun. 397, referred to in the principal case, left to the jury the question of what was a

reasonable time under all the circumstances for the presentment of a bill payable so many days after sight. In the course of his opinion he said: "What that reasonable time is, depends upon the circumstances of each particular case, and no definite rule has as yet been laid down, or indeed can be laid down, to govern all cases. The question is a question of fact for the jury, and not of law for the abstract decision of the court. Such, as I take it, is the doctrine of the authorities." To the same effect is *Straker v. Graham*, 4 Mees. & W. 721.

The prevailing doctrine is, however, that the question is a mixed one of law and fact, and that if the facts are admitted, or undisputed, or found by a special verdict, the court will decide what is a reasonable time for presentment or notice, as the case may be, but if the determination of some doubtful matters of fact are involved, the whole question will be left to the jury with appropriate instructions: *Chitty on Bills*, 369; *Haddock v. Murray*, 8 Am. Dec. 43; *Nash v. Harrington*, 16 Id.; *Chambers v. Hill*, 26 Tex. 472; *Nichols v. Blackmore*, 27 Id. 586; *Howe v. Huntington*, 15 Me. 353; *Fernandez v. Lewis*, 1 McCord, 322; *Sussex Bank v. Baldwin*, 17 N. J. L. (2 Harr.) 494; *Insurance Co. v. Allen*, 11 Mich. 506; *Shute v. Robins*, 3 Car. & P. 80.

APPLICATION IN OTHER CASES.—Where a contract is silent as to when a stipulated act is to be performed a reasonable time is generally allowed for its performance, and, in accordance with the general principle above discussed, the question as to what is a reasonable time will be decided by the court if there is no controversy about the facts, or if the facts have been found: *Attwood v. Clark*, 2 Greenl. 249; *Howe v. Huntington*, 15 Me. 350; *Blackwell v. Fosters*, 1 Met. (Ky.) 88; *Porter v. Blood*, 5 Pick. 54; *Morse v. Bellows*, 7 N. H. 549. But, in *Ellis v. Thompson*, 3 Mees. & W. 445, it was left to the jury to say whether or not an act stipulated in a contract (no time being specified for its performance) had been performed in a reasonable time. And so in *Cocker v. Franklin etc. Co.*, 3 Sumn. 532; *Henkle v. Smith*, 21 Ill. 241; *Wilder v. Sprague*, 50 Me. 355.

So, where a reasonable time is allowed for the rescission of a contract, the question as to what is a reasonable time, is a question of law, if the facts are not disputed: *Holbrook v. Burt*, 22 Pick. 555; *Kingsley v. Wallis*, 14 Me. 57; *Hill v. Hobart*, 16 Id. 164. But where there is a controversy about the facts the question is for the jury under the instructions of the court: *Gatling v. Newell*, 9 Ind. 577; *Hays v. Hays*, 10 Rich. 421. So it was left to the jury to say, in *Parker v. Palmer*, 4 Barn. & Ald. 387, whether or not the vendee of goods sold by sample had returned them within a reasonable time after discovering that they did not correspond with the sample.

Other cases, in which the question of reasonable time has been held one of law for the court, are the following: Where notice of abandonment for a total loss was given by the assured five days after he had received information of it, and the delay was held unreasonable: *Hunt v. Royal Ex. Ass. Co.*, 5 Mau. & Sel. 47. Where the question was as to the time allowed to a tenant at will to remove his family and goods: *Ellis v. Paige*, 1 Pick. 43. As to the time allowed to a patentee to file a disclaimer of an improvement included in his patent of which he does not claim to be the author: *O'Reilly v. Moore*, 15 How. (U. S.) 121; *Seymour v. McCormick*, 19 Id. 106. So where the question was as to whether or not one entitled to claim letters of administration had lost his precedence by delay: *Hughes v. Pipkin*, Phil. Law. (N. C.) 4. So where the question was as to the time allowed to one to act on a parol license the facts being agreed: *Gilmore v. Wilbur*, 12 Pick. 124.

In the following cases, on the other hand, owing to controversy about facts,

motions, etc., the question of reasonable time was left to the jury. Where the question was as to the time that tithe corn should be left on the premises for comparison with the whole corn: *Tacey v. Hendon*, 3 Barn. & C. 213. So where the question was as to the time allowed to sell goods after a distress: *Pitt v. Shew*, 4 Barn. & Ald. 208. So, where it was claimed in defense of an action brought for carrying away the plaintiff against his will on the defendant's vessel, that the plaintiff had delayed his departure from the vessel an unreasonable time after being warned that she was about to sail: *Spoor v. Spooner*, 12 Met. 285.

For further illustrations of this subject, see Wells on Questions of Law and Fact, sec. 151.

GORHAM v. GALE.

[7 COWEN, 739.]

NOTICE TO PRODUCE A PAPER at the trial is not sufficient to let in parol proof, unless served on the attorney before the term, where the paper is at the party's residence at a distance from the court.

PLAINTIFF'S ATTORNEY HAS POWER TO DIRECT THE SHERIFF as to the time and manner of enforcing execution.

SHERIFF EXECUTING A DEED ON A SALE BY HIS DEPUTY does not become liable for money received by the deputy upon such sale, pursuant to an arrangement with the plaintiff's attorney out of the usual course, of which the sheriff is not shown to have had any knowledge.

CREDIT ON SHERIFF'S SALES is unknown to the law.

EITHER THE SHERIFF OR DEPUTY MAY EXECUTE A DEED on a sale on execution made by the latter.

EXECUTION OF A DEED BY THE SHERIFF AFFIRMS nothing more in such a case than that the sale was made in the usual manner, and does not make him liable for any act of the deputy for which he was not before liable, particularly where the action for such act was commenced before the deed was executed.

SHERIFF IS LIABLE FOR HIS DEPUTY'S ACTS only in the ordinary execution of his office; hence, he is not liable for acts performed by the deputy out of the usual course, under instructions from the plaintiff or his attorney.

SURETIES OF DEPUTY ARE RESPONSIBLE only for his defaults in his official duties.

WHERE THE SHERIFF HAS NO REDRESS AGAINST the deputy or his sureties, he ought not to be liable for the deputy's acts.

ASSUMPSIT for money had and received, brought against the defendant, late sheriff of Washington county, to recover money received by one Stevens, his deputy, on a sale under a *fi. fa.* in the plaintiff's favor, against William and James Getty. At the trial, the plaintiff proved that on the afternoon of the first day of the circuit, his attorney served on the defendant's attorney a notice to produce the *fi. fa.* against the Gettys on the trial, or its contents would be proved by parol; and that on the third day of the circuit, the defendant admitted that the *fi. fa.* was at his

residence, about twenty miles from the court. The defendant objected that the notice was insufficient to warrant the introduction of parol evidence, but the objection was overruled. The contents of the *fi. fa.* were proved by parol, and it appeared that it was made returnable the first Monday in August, 1822. It further appeared that Stevens, the defendant's deputy, had received two hundred dollars thereon, which he had promised to pay, but had not paid. Walter Raleigh, the plaintiff's attorney, testified that James Getty was joined in the judgment as surety for William; that he, Raleigh, wrote to Stevens, August 20, 1822, stating that James Getty had proposed to bid the amount of the judgment for certain land of William Getty, and to pay two hundred dollars down, and the rest in six months; and the letter contained the following instructions: "If Mr. Getty pays the two hundred dollars on the sale, or on the week following, you can give him a receipt for that sum, to be executed when the residue is paid; and on payment of the balance, give him a certificate, that is to say, to be no sale completed until the residue is paid. Your terms of sale will be cash down, and, of course, the bargain not to be completed until the whole amount is paid. Mr. Gorham does not want to discharge the judgment, and take any new security on the payment of two hundred dollars, but to have it stand in force until the whole is satisfied; but is willing that Getty should have six months to pay the balance over two hundred dollars." Mr. Raleigh also testified that the plaintiff informed him, before the letter was written, that he had made an agreement with James Getty substantially as therein stated, and directed him to write to the sheriff to that effect. It was further proved, that at a sale made August 24, 1822, James Getty bid off the property pursuant to the agreement, and paid the two hundred dollars to Stevens. The defendant, as sheriff, executed a deed to the purchaser, November 24, 1825, after the commencement of this action, which was begun in February, 1823. There was no evidence that the defendant, prior to the making of said deed, had any knowledge of the arrangement with Getty, or of the instructions to Stevens; but the plaintiff's attorney testified that he informed the defendant, by letter, in December, 1822, of the fact that Stevens had received the said two hundred dollars, and had not paid it over. Verdict for the plaintiff, subject to the opinion of the court.

D. Russell, for the plaintiff.

S. Stevens, contra.

By Court, WOODWORTH, J. In February term, 1826, a new trial was granted in this cause, after a verdict for the plaintiff, on facts not varying materially from the present, excepting that these additional points are here raised: 1. As to the admission of parol evidence to prove the execution; 2. That on the last trial there appeared a variance between the letter of instructions and the directions given by the plaintiff; 3. That the sheriff executed a deed of the premises.

First, then, was the notice to produce the execution given in reasonable time? If the execution had been in the sheriff's possession, and under his control at the trial, the notice would have been sufficient. But there is no evidence of this; nor any presumption that when he left home he took with him evidence not then called for; and which it was necessary for the plaintiff to produce. The question of reasonable notice depends on the facts disclosed. I do not think that at the circuit one party has a right to call on the other to produce documents, the production of which will require him to travel a distance to procure them; and when, for aught that appears, during the interval the cause may be ordered on for trial. Besides, it was unreasonable to impose on the defendant the trouble and expense of sending for a paper, which, had the other party exercised ordinary diligence, might have been avoided. If the execution was really a necessary part of the plaintiff's proof, he was guilty of laches in not having given the notice somewhat earlier. No cause is assigned for the omission; and under the circumstances the parol evidence should have been excluded.

Secondly; it seems to me that whether we take the instructions stated by Mr. Raleigh, or the letter written by him, there is no substantial difference. But if it were otherwise, I apprehend it was competent for the attorney to give the directions contained in his letter; and that his client was bound by them. It was a proceeding in the progress of the suit, considered beneficial to the parties in that action; and within the scope of the authority vested in the attorney. Although he can not enter a *retraxit*, Cro. Jac. 211; 1 Bac. Abr. 299, or discharge a defendant from execution without payment, 2 Johns. 361; 10 Id. 220, he may and ought to exercise his discretion in all the ordinary occurrences which take place in relation to the cause. He may make stipulation, waive technical advantages, and generally assume the control of the action. It has been held that the attorney's consent to stand to an arbitration will bind the client: Carth. 412; 1 Salk. 70; 1 Bac. Abr. 299. So, also, where the

attorney entered a *remittet damna* as to part, and took judgment for the rest, it was held regular; and that this need not be by the plaintiff in person: 2 Ld. Raym. 1142; 1 Salk. 89. Indeed, it is stated as a doubtful point in *Crary v. Turner*, 6 Johns. 53, whether the attorney on record could not discharge the debt without satisfaction. The court say that to him, "the law necessarily confides a pretty enlarged discretion and control over the suit." The instructions, then, were binding on the plaintiff.

Thirdly; I do not think the execution of the deed material. The plaintiff contends that this is an affirmance of the acts of Stevens, and, therefore, the defendant is liable. In the first place, there is no proof to show that the defendant had any knowledge of the facts and circumstances relating to the arrangement made by the plaintiff with Stevens, or that the sale was to be conducted out of the usual course. If, therefore, independent of the fact that a deed was executed, the defendant was not liable, knowledge of the previous proceedings before he executed the deed ought to have been shown. The act of executing a conveyance is the ordinary act of the sheriff after a sale. It may be executed either by the sheriff or his deputy. And so far as it is an affirmation of anything, it is that a sale has been made in the usual manner. The mere execution of the deed never can or ought to be considered an affirmance of acts for which the sheriff was not before liable. Besides, if the defendant had known that the plaintiff had made Stevens his agent, or had given him the instructions proved, it opposed no ground of objection to the execution of the deed. Between the parties, the course taken was perfectly proper; if they preferred it. Whether the sale was in the ordinary way, or under these special instructions, a deed would become necessary to be executed by the sheriff or his deputy. The sheriff only required to be convinced that a sale had been made, the execution satisfied, and that James Getty was entitled to a deed. These facts are undoubtedly affirmed; but in what manner payment was made, whether to the plaintiff or his attorney, or to a special agent, or whether the money was paid under circumstances to render the sheriff liable or not, are questions with which the deed has no connection. It leaves them as it found them, to be decided upon the pre-existing facts. If, however, the deed established the plaintiff's right to recover, then that right did not exist before the twenty-fourth day of November.

1825, the day of its date. This action was commenced a considerable time before.

The only remaining question is as to the legal effect of the instructions given to Stevens. That is the same presented on a former occasion. We then held that a sheriff is only amenable for the acts of his deputy in the ordinary execution of his office. To see that in this case he had not acted in that manner, but must be considered as the agent of the plaintiff, it is only necessary to look at the instructions. The two hundred dollars were not to be credited until the whole was paid. Here is a departure; for payment made to a sheriff is a satisfaction *pro tanto*. Six months were allowed to pay the balance. A credit is unknown in the law regulating sheriff's sales. The judgment was to stand until the whole was paid; whereas by law, in the ordinary discharge of the sheriff's duties, only the part unpaid would stand in force. On payment of the balance, a certificate was to be given. By the statute of 1820, sess. 43, c. 184, s. 1, p. 167, a certificate should have been given at the time of sale, and a duplicate filed within ten days after. It will not, I think, be contended that here was not a departure from the duties of a sheriff in the regular discharge of his official business. If there be a departure by the deputy, is the sheriff responsible? No proposition is clearer than that the sureties of the deputy are not amenable beyond default of their principal in his official duties. The conclusion that follows is that the sheriff ought not to be liable for the acts of his deputy, unless his redress against the deputy and his sureties is unquestionable. That the sheriff is only answerable *civiliter* for the malfeasance or nonfeasance of his deputies, in the duties enjoined on them by law, is well settled by various authorities: 4 Mass. 63; 2 Esp. 591; 4 T. R. 119.

On the whole, it is the opinion of the court that judgment be entered for the defendant.

Judgment for the defendant.

RECOGNIZED AS AUTHORITY ON THE FOLLOWING POINTS: That notice at the trial to produce a paper not shown to be in the party's personal possession, his residence being at a distance from the place of holding court, is insufficient: *Story v. Patten*, 3 Wend. 488; that an attorney has power under his general warrant to control the sheriff, and make a deputy the private agent of his client: *Walters v. Sykes*, 22 Wend. 568; *Corning v. Southland*, 3 Hill, 555; that an attorney has full power to control the suit during its progress, and while this power ends in some respects on the rendition of judgment, yet it extends, nevertheless, to issuing execution and directing its enforcement, receiving payment, acknowledging

satisfaction, etc.: *Lovell v. Orser*, 1 Bos. 351; *Steward v. Biddlecum*, 2 N. Y. 106; *Clark v. Richards*, 3 E. D. Smith, 96; *Lewis v. Woodruff*, 15 How. Pr. 543; *Lusk v. Hastings*, 1 Hill, 659; *Walradt v. Maynard*, 3 Barb. 587; *Ex parte Shumway*, 4 Denio, 259; that a sheriff is responsible for the acts of his deputy only in the ordinary line of his official duty, and not for acts performed outside of the deputy's usual course of duty by the plaintiff's direction: *Acker v. Ledyard*, 8 Barb. 517; *Sheldon v. Payne*, 7 N. Y. 458; S. C., 10 Id. 401; that the sheriff should not be held responsible for the acts of his deputy, unless his redress against such deputy and his sureties is clear and unquestionable: *Moulton v. Norton*, 5 Barb. 296; and that a principal's ratification of his agent's unauthorized act will not relate back so as to support an action therefor previously commenced: *Gilbert v. Sharp*, 2 Lana. 414; *Bliss v. Cottle*, 32 Barb. 326.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

TURNER v. CHILD.

[1 DEVEREUX'S LAW, 25, 133, 331.]

AGENT DOES NOT BECOME EXECUTOR DE SON TORT by collecting, after his principal's death, debts due on a sale made by him in the principal's lifetime; if the sale is made after the death, it is otherwise.

COLORABLE AUTHORITY TO INTERMEDDLE WITH GOODS of a decedent does not render one executor *de son tort*.

ACT FOR WHICH THE AGENT IS LIABLE TO THE ADMINISTRATOR does not make him executor *de son tort*.

REFUSING LEAVE TO ADD A PLEA after the cause is at issue, is within the discretion of the court, and, therefore, not appealable.

CREDIBILITY OF EVIDENCE, whether oral or written, is a matter for the jury to decide.

PARTY RELYING ON AN ACCOUNT for the purpose of claiming a credit, must accept it as a whole, though he may contradict or disprove it.

SUB-AGENT IS EXECUTOR DE SON TORT, WHEN.—A person appointed by an agent to sell the principal's goods and to collect debts due him becomes an executor *de son tort* if he continues to act after the principal's death and notice from the agent that the agency is at an end.

EXECUTOR DE SON TORT CAN NOT RETAIN for his own debt.

ASSUMPSIT for goods sold, charging the defendant as executor *de son tort* of Francis Child. At the trial below, before the jury were impaneled, the defendant moved, on affidavits, for leave to add a plea of "fully administered," which was refused. It appeared that, Francis Child having removed from the state, the defendant, as his agent, sold the said Child's property, January 3, 1823, on a six months' credit; that after Child's death on January 16, 1823, the defendant collected the notes given at the sale, and that an administrator had been duly appointed. It

further appeared that the plaintiff's claim against the deceased was for a balance on an account due from the said deceased to the plaintiff and his late partner, Young, now also deceased. It was proved that the account was drawn up in the presence, and under the direction, of Young, the deceased partner, and that Francis Child was in the room at the time; but it did not appear that the account was presented to, or approved by, the said Child. There were sundry items charged in the said account, including a certain wagon, the purchase of which was proved by the plaintiff. Certain credits also appeared on the account, which showed a balance against Francis Child; but the amount of the credits exceeded the value of the wagon referred to, and the defendant, therefore, insisted that, as the wagon was the only item proved, the plaintiff ought not to recover.

The judge charged the jury that, as the defendant's agency was revoked by Francis Child's death, his subsequent intermeddling with the estate rendered him liable as executor *de son tort* to creditors; and that as the instructions given by Young when the account was drawn, and the account itself, were all one transaction, and had all been offered in evidence as one connected statement, the defendant could not take a part of it separated from the rest and rely upon it. Verdict for the plaintiff. Rule for a new trial discharged and judgment on the verdict, from which the defendant appealed.

Badger, for the plaintiff.

Nash, for the defendant.

TAYLOR, C. J. This case having been submitted without argument, and presenting one question of some difficulty and of no ordinary occurrence, I have examined the authorities with the view of ascertaining the principle which ought to govern the decision.

The principal question is, whether the defendant, having collected debts due to Francis Child, after the death of the latter, though incurred for property sold during his life-time by the defendant, duly authorized for that purpose, will amount to such an intermeddling as will make the defendant executor of his own wrong.

I take it for granted that the sale, being made in the life-time of Francis, was properly made under an authority from him; but the cases have satisfied my mind that upon the death of Francis, all further power conferred by the agency was at an end; for a power to represent another can only continue as long as

there is some one to be represented. Therefore, a letter of attorney to deliver seisin after the death of the feoffor is void, because, upon his death, the lands descend to his heirs: Co. Litt. 52 b, and for a similar reason a power to collect debts after the death of the principal, supposing it to have been expressly granted, which it was not in this case, must be void, because the right to collect the debts devolves upon the executor or administrator. In like manner, the payment of a sailor's wages to a person having the power of attorney to receive them, has been held void where the principal was dead at the time of payment: 5 Esp. 118. And what appears to me to be a strong case, going far beyond the one under consideration, it has been held that a power of attorney given to a creditor, authorizing him to receive a debt without any actual appropriation or assignment of it, is void after the death of the debtor, although the latter declared at the time that it was given with the view to enable the creditor to apply the money received toward the liquidation of his own debt: 2 Ves. & Bea. 51.

It appears to me that if any case can decisively show the inflexible quality of the rule of law, that all authority ceases at the death of the principal, this case does show it; for if it cannot be relaxed in favor of a creditor whom the debtor was desirous to secure, and to secure whom he did everything short of an actual assignment of his demand, ought it to be relaxed in favor of one who is not a creditor? Of one who, when he collected the money, did not apply it to the payment of Francis Child's debts, or, as it appears from the case, had an intention to do so? So if the power be coupled with an interest, it is instantly revoked by the death of the grantor, and an act done under it afterwards, though *bona fide*, and before notice of the death of the grantor, is a nullity: 4 Campb. 272. And the case in 2 T. R. 97, incontestably shows that if a man receive the money of the intestate after his decease, although it was received according to an order in his life-time, it will make him an executor *de son tort*. If it be an express power to sell and collect money, it is revoked by the death of the grantor; *a fortiori* it must be, where the power to collect is only incidental and implied from the power of selling. From the view of the authorities, it results that the defendant has collected the debts of the deceased without legal authority, and, I think, without the color of it; and in so doing has announced to the creditors that he has taken upon himself the burden of administration; he has made this announcement by such acts as are the usual and ordinary indications to

creditors against whom they are to bring their actions. The law says that slight circumstances of intermeddling are sufficient for the purpose of charging a man as executor of his own wrong. The cases put by way of illustrating this rule are the slightest imaginable, and such as can lessen the value of the estate, or affect the interests of the creditors, but in the most inconsiderable degree. But collecting the debts due the deceased without paying the creditors is not only sweeping away the fund which the law has appropriated to them, but is also the least equivocal act a man can do who desires to be considered as administering; an act, too, of which there can seldom be any difficulty of proof.

I lay no stress upon the circumstance that the extent of the power to the defendant was not shown, or whether he was authorized to sell upon credit; because, upon the assumption that the power of attorney was as broad as a skillful conveyancer could make it, yet nothing that I can perceive in the case will avert the consequence, that the debts due for the things sold, whether by specialty or single contract, became *ipso facto*, on the death of Francis Child, the property of his rightful administrator.

The refusal of permission by the court to add the pleas, was a subject within its discretion, and cannot be made the ground of appeal: *Armstrong v. Wright*, 1 Hawks, 93.

The evidence relative to the account was properly left to the jury, for it is their province, in a court of law, to decide what credit is to be attached to the whole or part of any statement, whether oral or written: Dougl. 781.

The general rule is, that if a party relies upon an account produced for the purpose of claiming credit, the account must be taken altogether; the party may, indeed, contradict or disprove it, but if he do not, it is evidence to the jury: 5 Taun. 245.

In my opinion, there was no error in the charge of the court, and I am in favor of affirming the judgment.

The whole court concurred with the chief justice in the foregoing opinion, except on the point as to the liability of the defendant as executor *de son tort*. On that point Henderson, J., delivered the opinion of the majority in favor of reversal, as follows:

HENDERSON, J. I am of opinion that the collection by the defendant, after the death of his principal, of debts due on sales made by him as agent in his principal's life-time, does not make him an executor of his own wrong. The collection of

the money has a reference to the agency, and must be considered as the completion of an act, proper and lawful in its commencement; and if it does not depend on the strict question of right, whether the agent had an authority to make the collection, a colorable one will do, by which a character is given to the transaction, showing that it was not done as an executor, or as one performing the will of the deceased: 1 Esp. 335. But I am rather disposed to think that the receipt of this money is not only colorably right, but actually so, and that a payment made by the purchaser, without directions to the contrary, is a discharge from the debt, and if so, it is not an officious intermeddling; for it would be strange if an act for which an authority exists, will make a person executor of his own wrong. A sense of duty, very probably, induced the collection of the money. The sale was made by the defendant, and he might hold himself bound to omit no reasonable exertion that the proceeds should be forthcoming to the rightful owner when he should be called on for an account of his agency. It is entirely unlike the case of *Padget v. Priest & Porter*, 2 T. R. 97, where the sale was made after the principal's death, at which time the authority ceased. If the debt arising from the sale had depended on the contract of sale only, it is not to be questioned but that the rightful administrator could have recovered on the contract, but if the agent had taken a bond or note, payable to himself, I cannot see how the administrator, or any other person but the defendant, could have enforced payment; and if so, there cannot be the least pretense of charging him as an executor of his own wrong.

It appears also that there is an administrator. Of course, no act for which the defendant is responsible to the administrator can make him an executor of his own wrong. For where administration has been taken, those acts only which subject the agent, not to the action of the rightful administrator, but which interfere with the estate *quoad* creditors, render him liable as an executor of his own wrong, as if he takes possession, or even has possession, of goods under a fraudulent gift from the deceased, this makes him executor *de son tort*, for it does not subject him to the action of the rightful administrator, the gift being good as to the intestate is good as to the administrator also, but it is void as to creditors.

Judgment reversed, and a new trial granted.

A new trial was had in the court below in accordance with the foregoing decision, when it appeared that there was no rightful

personal representative of Francis Child; that the defendant had not been appointed by the deceased as his agent; that one Clancy had been appointed such agent; that Clancy authorized the defendant to sell the property of the said Francis on credit, and apply the proceeds on debts due the defendant, and others for which he was responsible; that on the death of the said Francis, before the credit expired, Clancy refused to interfere with the property, and so notified the defendant; but that the latter, nevertheless, collected the notes taken at the sale to an amount larger than the amount due him, or for which he was responsible. The defendant offered to show that Francis Child when he left the state took away certain horses belonging to the defendant, but the evidence was rejected as irrelevant.

Verdict for the plaintiff. Rule for a new trial discharged, and the defendant appealed.

Badger, for the plaintiff.

The Attorney-general and Devereux, for the defendant.

TAYLOR, C. J. The case is somewhat different in its circumstances, from what it was when before appealed from, for it now appears that there was no rightful administrator on the effects of Francis Child. It follows thence, that if the defendant has done any act which makes him liable as executor *de son tort*, the plaintiff having established his debt, is entitled to recover. Another feature in the case now is, that Clancy was appointed the attorney in fact of Francis, and that the defendant's authority was derived under this agency. Supposing, therefore, that the attorney was authorized to collect the money arising from the sale after the death of his principal, yet Clancy renounced the authority after hearing of the death of F. Child, and gave notice to the defendant that he had done so; but after this, when the defendant was without a shadow of authority, he collected money belonging to the estate. This makes him an executor *de son tort*, and the remaining question is, whether the evidence of F. Child, having taken away horses belonging to the defendant, was properly rejected. I think it was in no manner connected with the fact which made the defendant executor *de son tort*, viz., the taking into his possession the goods of his brother, and collecting his debts; and because, if the defendant meant to rely upon it, as authorizing him to retain it was inadmissible. Such an executor cannot retain for his own debt; otherwise there would be a struggle among creditors to obtain possession of the goods, without obtaining administration. If he

pleads a retainer to satisfy his own debt, the plaintiff may reply that he is executor *de son tort*: *Alexander v. Lane*, Yelv. 137. Nor can he defend himself by showing that he has paid debts of the deceased to the amount of what he has received, unless he pleads *plene administravit*: *Whitehall v. Squire*, Carthew, 104. I am of opinion that the case has been properly decided, and that the judgment be affirmed.

By COURT. Judgment affirmed.

EXECUTOR DE SON TORT—COLORABLE RIGHT.—In *McMorine v. Storey*, 4 Dev. & B. 189, it was held that the principle of the foregoing decision, that one intermeddling with a decedent's estate, under a colorable right, does not become executor *de son tort*, did not apply where the administrator of one who was chargeable as executor *de son tort*, by reason of his being a fraudulent donee of certain property of a deceased person, took possession of the property as such administrator. In that case, it appeared that the plaintiff was a creditor of one David Davis, deceased; that the said David had made a fraudulent transfer of certain slaves to his brother Joseph, and that Storey, the defendant, as administrator of the said Joseph, had taken possession of the slaves, claiming them as assets of his intestate. The defendant relied upon *Turner v. Child*, to sustain the position that he was not liable as executor *de son tort*, because he was acting under a color of right in the premises; but, on this point, Daniel, J., speaking for the court, said: "The counsel for the defendant admits that if Joseph Davis was alive, and if the present plaintiff, a creditor of David, had sued him, he could have recovered, as Joseph was an executor *de son tort* of David: *Osborne v. Moss*, 7 Johns. 161 [5 Am. Dec. 252]. But that as Joseph died in possession of the slaves, Storey intermeddled with them under a color of right, as administrator of Joseph. He cited the case of *Turner v. Child*, 1 Dev. 25, and Williams on Ex'rs, 140. We think the counsel's references are not in point for him. In the first, Samuel Child was left agent by Francis Child, to sell property at a credit of six months, and collect the proceeds of the sale. He sold, and before the credit was out, his principal died, and he, having possession of the evidences of the debts, proceeded to collect. Two of the judges of this court, against the opinions of the chief justice and the judge who tried the cause in the superior court, were of the opinion that this did not make him an executor *de son tort*. Samuel Child had been rightfully put into the possession of the property, not only as to his principal, but as to all the world. But Storey, *quoad* the claim of the present plaintiff, had no right to intermeddle with the slaves, by force of the letters of administration on the estate of Joseph granted to him. The letters granted by the court authorized him to administer the goods and chattels that lately belonged to Joseph. As to the creditors of David, these slaves were the assets of David. Storey not having the possession, nor any legal authority, as to the plaintiff, to take possession by force of his character of administrator of Joseph, is, in law, a wrong-doer or intermeddler with those assets of David which the law had appropriated to the satisfaction of the plaintiff's debt."

So, in *Bailey v. Miller*, 5 Ired. 444, it seems to have been thought, on somewhat similar grounds, that one receiving goods from a person to whom they were fraudulently transferred by a decedent would not be protected by the doctrine of the principal case, unless he took them upon a *bona fide* pur-

chase, or as a bailee of the donee without notice of the fraud. In that case, the defendant claimed to hold the goods with which he was accused of intermeddling for his grandson, an infant in arms, under a deed of gift to the latter from his deceased father. The plaintiff was a creditor of the deceased as to whom the deed was fraudulent, and he sought to charge the defendant as executor *de son tort*. The latter claimed, however, that his possession as agent of the donee was under color of right, and that he was, therefore, entitled to the benefit of the principle laid down in *Turner v. Child*. On this branch of the case, Ruffin, C. J., delivering the opinion of the court, said: "There is no doubt that a fraudulent donee is liable as executor of his own wrong: *Edwards v. Harben*, 2 T. R. 587. But it is said that although that be true, yet one who takes possession as the agent of the fraudulent donee, does not become executor, as he has a fair color for his possession which gives a character to it, and shows that he did not intend to administer the goods, or in any manner to treat them as the effects of the deceased, which is said upon the authority of *Turner v. Child*, 1 Dev. 25. That case, in which the doctrine held by the majority of the court seems to us to be carried to the utmost extreme, does not, we think, apply to the present. There everything was assumed to be *bona fide*, and that the agent continued to act under a sense of duty, and without being aware that the authority which he derived from his principal ceased at his death. His acts had a lawful beginning, and that was sufficient to excuse him, as the court thought. But the contrary is the case here. The origin and continuance of the defendant's possession are tainted with fraud, and without color of authority from any one. If, indeed, the fraudulent donee disposes of the goods to another, who accepts them *bona fide* upon a purchase, or even to keep for the donee, the vendee or bailee would not be executor *de son tort*: Com. Dig. Administrator, C. But that is because there is apparently no wrong in any one in that transaction, and the possessor has no reason to consider the goods as being of the estate of deceased." The learned judge further insisted that the defendant, in that case, had not been, in fact, appointed agent, and, indeed, could not have been from the tender years of the pretended principal, but that he had officiously and without authority assumed to act as agent.

The principle of *Turner v. Child*, was approved in *Outlaw v. Farmer*, 71 N. C. 31, where it was held that agents appointed by the only persons who were beneficially interested in the estate of an intestate, to sell the property, etc., there being no debts, did not become executors *de son tort* by intermeddling with the property before the appointment of an administrator.

An agent in possession of funds of his principal, having accepted an order drawn thereon by the principal, does not become executor *de son tort* by paying the order out of those funds after the principal's death: *Debesse v. Napier*, 10 Am. Dec. 658. An executor *de son tort* is one who takes possession of the goods of a decedent without color of title; if he has color of title, it is otherwise: *Johnston v. Duncan*, 14 Id. 54.

STATE v. BROWN.

[1 DEVEREUX'S LAW, 137.]

INDICTMENT FOR STEALING "A PARCEL OF OATS" is sufficiently certain.

INDICTMENT charging the defendant with feloniously stealing and carrying away "a parcel of oats." Verdict of guilty. The

defendant moved in arrest of judgment on the ground that the property stolen was not described with sufficient certainty. Motion overruled and sentence passed; whereupon the defendant appealed.

Attorney-general, for the state.

Nash, for the defendant.

By Court, TAYLOR, C. J. It appears to me that the article charged to be stolen is described with convenient certainty, and comes up to what is required in indictments and declarations, viz.: certainty to a certain intent in general.

Where this is required, everything which the pleader should have stated, must be expressly alleged, or by necessary implication be included in what is alleged, otherwise it will be presumed against him. Now "parcel" signifies a part of the whole taken separately, and has for one of its meanings, "a small bundle:" Johnson's Dict. A bundle of oats is the term actually employed, because oats are so made up for sale, and other purposes; but one name seems scarcely more certain than the other. It is, therefore, distinguishable from the cases in the books, where indictments have been held defective for uncertainty in the description of the articles. As an indictment for stealing the goods and chattels of S. S., without any further specifications of them; for engrossing a great quantity of straw and hay, or divers bundles of wheat, without showing how much of each, and various causes, to the same effect: 2 Haw. 382. Here there is but one article, and the quantity of that so described that the mind can not hesitate in understanding it. The motion to arrest the judgment should be overruled.

Judgment affirmed.

STATE v. ORRELL.

[1 DEVEREUX'S LAW, 139.]

INDICTMENT MUST STATE THE TIME when an offense was committed, but the proof need not be confined to that time; it is only necessary to show that the offense was committed prior to the finding of the indictment.

IF DEATH DO NOT ENSUE WITHIN A YEAR AND A DAY after a wound is given, the law will presume the wound did not cause the death.

INDICTMENT FOR MURDER MUST SHOW that death ensued within a year and a day after the wound, or it will be fatally defective.

INDICTMENT MUST SHOW THAT DEATH OCCURRED IN THE COUNTY or it will be defective. *Per* Taylor, C. J.

INDICTMENT for murder, charging the wound to have been given in New Hanover county, May 17, 1826, and that the de-

ceased died of said wound. It did not appear, from the indictment, that death ensued within a year and a day after the wound was given, or that the death occurred in the county of New Hanover. On these grounds, after a verdict for the state, the prisoner's counsel moved to arrest the judgment. The judgment was arrested accordingly, whereupon an appeal was taken on behalf of the state.

The Attorney-general, for the state, submitted the cause without argument.

No counsel appeared for the prisoner.

HENDERSON, J. All the authorities tell us that some period of time, when the alleged offense was committed, must be stated in the indictment; yet the very same authorities most expressly inform us that it is entirely unimportant to confine the proofs of the commission of the crime to the day charged; all that is required is to show the offense was committed prior to the filing of the bill of indictment. Thus, an indictment omitting to state any time when an offense was committed, is insufficient; yet if the bill states that an offense was committed, as in this case, on the seventeenth day of May, 1826, proof of an offense committed on the first day of January, 1825, will support the charge. All that the law requires is that an offense prior in point of time to the filing of the bill should be proved. But it is our business to declare the law as we find it established by the lawmakers, not to make it ourselves; from these principles it necessarily follows that we must not understand that the mortal wound was given on the seventeenth day of May, 1826. It may have been given at any day previous to the finding of the bill, for such proof would have supported the charge that it was given on that day. We can not, therefore, draw any aid from the time laid in the bill, when the wound was given, and by comparing that time with the filing of the bill show that the death followed within one year and a day from the time the wound was given. If such was not the case, that is, if death did not take place within a year and a day of the time of receiving the wound, the law draws the conclusion that it was not the cause of death; and neither the court nor jury can draw a contrary one. It not appearing, therefore, upon this indictment when the death happened, and as it may have been more than the period aforesaid after the wound, the court is bound to say that it does not appear to them that the defendant has been guilty of the murder of the deceased. The judgment, therefore,

was properly arrested in the court below, for it is essential that it should appear that death ensued within what may be called the prescribed time.

TAYLOR, C. J. I can not doubt that both the objections to this indictment are well taken. The place of the death ought to be stated, to the end of showing that the offense charged is within the jurisdiction of the court. Though the rule was plain of common law, that murder, in common with other offenses, must be inquired into in the county wherein it was committed, yet it was doubted whether if a person received the stroke in one county, and died in another, the offense was completed in either. The statute of 2 and 3, Edw. VI., provides, however, that the trial shall be in the county where the death happens, and supposing that statute to be in force, it can not be intended on this indictment that the death took place in New Hanover; for aught that appears, it may have taken place out of the state.

Nor is it less important to state the time of the death, in order to show that the deceased died of the wound given her by the prisoner, within a year and a day after she received it. For if the death happened beyond that time, the law would presume that it proceeded from some other cause than the wound: 2 Inst. 218. For these reasons, I am of opinion the judgment should be arrested.

Judgment affirmed.

TIME OF AN OFFENSE MUST BE STATED DEFINITELY in an indictment: *State v. G. S.*, 4 Am. Dec. 724. If the indictment state an impossible or a future day, it will be fatally defective: *State v. Sexton*, 14 Am. Dec. 584.

BUFFERLOW v. NEWSOM.

[1 DEVEREUX'S LAW, 208.]

TENANT IS BOUND BY AN ESTOPPEL on his landlord existing before the tenant's title is derived.

WIDOW IS ESTOPPED BY HER HUSBAND'S DEED, where she succeeds to his possession without any allotment of dower, she being tenant to the heir who is estopped.

ESTOPPEL IN PAIS BINDING A HUSBAND binds his widow also with respect to land of which she succeeds to his possession.

ESTOPPEL IS BINDING UPON THE JURY where it has not been waived by the party in pleading, and a finding contrary thereto may be disregarded by the court.

EJECTMENT. Verdict taken below for the plaintiff, subject to the opinion of the court upon the following facts: One Jesse Webb, being in possession as owner, conveyed the premises in fee to John D. Amis March 16, 1817, in trust to sell and pay a certain debt of Webb due to another, if Webb should fail to pay it. Webb paid the debt and procured a release from the creditor of all claim to the land. No sale or conveyance was ever made by John D. Amis. Webb continued in possession, and on September 30, 1820, with the consent of his late creditor and the said Amis, sold and conveyed to the plaintiff's lessor in fee with general warranty, but remained in possession and cultivated the land, with grantee's consent, though without any formal lease, until his death, in March, 1821. The deceased's widow remained in possession afterwards with the rest of his family, without any allotment of dower, and without setting up any claim except that derived from her husband. In November, 1823, the widow intermarried with the defendant Newsom, who entered into possession, setting up no title except such as his wife had.

It was agreed that, if the court should be of opinion, upon these facts, that the defendant was estopped to set up the outstanding title of Amis to defeat the action, the verdict should stand, otherwise a nonsuit should be entered. The court below gave judgment on the verdict from which the defendant appealed.

Seawell, for the appellant.

Badger, contra.

HENDERSON, J. The defendant is doubly estopped from showing title in John D. Amis, first by the deed of Jesse Webb to the lessor of the plaintiff. The widow is estopped by her husband's deed, for she is tenant to the heir who is estopped, and the tenant is always bound by an estoppel on his landlord, when his title is derived after it arises. She is also estopped by matter *in pais*; her husband, after his conveyance to the lessor of the plaintiff, occupied the lands as tenant at will or sufferance under the lessor; he could not, therefore, dispute his landlord's title. Upon his death the widow succeeded to the possession, accompanied by the estoppel, as she could not succeed to her husband's possession stripped of its incidents; one of which was that he could not dispute his lessor's title. The defendant, upon his marriage with the widow, succeeded to her possession in the same manner in which she held. The judge was, therefore, correct in disregarding the facts showing title in John D.

Amis, and although it is said that a jury is not estopped, but may find the truth, that is only in such cases where the party has waived the estoppel, as when, having an opportunity to plead and rely on it, he omits to do so, but relies on the real fact: *Treviran v. Lawrence*, 1 Silk. 276.¹ In this case, from the nature of the action, he could not plead it; he shall, therefore, have the same advantage on the evidence as if he had pleaded and relied on it. It is not intended to impugn the rule, that in an ejectment the lessor of the plaintiff recovers by the strength of his own title, and not by the weakness of his adversary's. In this case, the evidence which shows his title to be weak, to wit, that the title is in John D. Amis, is excluded by the estoppel, and if offered and found by the jury, must be disregarded, for the estoppels, the admissions of the parties, appear also.

By Court. Judgment affirmed.

THAT A WIDOW IS BOUND BY ESTOPPELS binding upon her husband where she continues his possession: See *Gorham v. Brenon*, 2 Dev. 174; *Norwood v. Marrow*, 4 Dev. & B. 442; *Williams v. Bennett*, 4 Ired. 122; *Grandy v. Bailey*, 13 Id. 221, all approving the principal case.

JONES v. HUGGINS.

[1 DEVEREUX'S LAW, 223.]

HANDWRITING OF A SURVEYOR LONG DECEASED, in a particular plat of survey, may be proved by a witness who has acquired his knowledge by examining many plats of surveys, purporting to have been made by the same surveyor.

ANCIENT SURVEY of land, made under the owner's direction and for his convenience, is not evidence for him or those claiming through him.

TRESPASS *quare clausum fregit*. The plaintiff deduced title through one Starkey, and, for the purpose of showing that Starkey's boundaries included the premises, gave in evidence a certain map or plan of survey, with written explanations annexed, which purported to have been made in 1759, when Starkey was owner, by one Skibbow, a deputy surveyor long deceased, under the direction and for the use of the said Starkey. To prove Skibbow's handwriting, the plaintiff introduced an aged witness, who testified that Skibbow died before he could remember, but that he had understood from general report, that the said Skibbow had, in his life-time, acted as deputy surveyor; that he, the witness, had seen many plats of surveys

1. 1 Salk. 276.

attached to land grants, and purporting to have been made by Skibbow, and that, from his knowledge thus acquired, he believed that the map produced, together with the annexed explanations, was wholly Skibbow's handwriting. The map or plat was thereupon admitted by the judge of the court below against the defendant's objection, its weight and effect being left to the jury. After a verdict for the plaintiff, and judgment thereon, a new trial having been refused, the defendant appealed to this court.

Badger, for the appellant. The testimony of the witness, as to Skibbow's handwriting, was based on a comparison of hands, and not on knowledge derived from having seen the party write, or from having received letters from him, or from an inspection of ancient and authentic documents signed by him, and was, therefore, inadmissible: *Brockland v. Woodley*, Gilb. Ev. 47, n.; *State v. Allen*, 1 Hawk's 6 [9 Am. Dec. 616]; 1 Stark. Ev. 167, 169. The survey, if properly proved, was inadmissible, being *ex parte*, and, in effect, merely the statement or declaration of the person through whom the plaintiff claimed: *Peake's Ev.* 60; 1 Stark. Ev. 26; *Bridgman v. Jennings*, 1 Ld. Raym. 734.

Gaston, contra. The witness to Skibbow's handwriting was competent, having acquired his knowledge from an examination of ancient and authentic documents, there being no other mode of getting that knowledge, owing to the antiquity of the map in question: 2 Stark. Ev. 651, 656; 1 Phil. Ev. 372; Bull. N. P. 235, 236; *Lessee of Thomas v. Harlocker*, 1 Dall. 14; *Roe ex dem. Brune v. Rawlings*, 7 East, 282; *Morewood v. Wood*, 14 Id. 327. The authenticity of the map and explanation being established, it was admissible, as the declaration of a deceased witness concerning a boundary made before any dispute had arisen.

TAYLOR, C. J. I consider that the evidence offered of Skibbow's handwriting was legally admitted, and that it was certainly free from the objection of its being proof from comparison of hands. The witness was an aged man, and Skibbow had died before his remembrance; the witness' knowledge of the general character of Skibbow's handwriting was derived from having inspected many plats of surveys annexed to grants, which surveys purported to have been made by him, who was reputed to be a surveyor or deputy. I think this satisfies the rule of law that the witness must have acquired his knowledge of the handwriting by sufficient means; for the authenticity of these grants, held by

various persons as the muniments of their estates, can not reasonably be questioned. The offices, where they issue and where they are recorded, the small temptation presented to commit forgery and the facility of detecting it, place these documents on more elevated ground than bank-bills or post-office franks, and bring them within the operations of the rule stated by Le Blanc, J., in *Roe v. Rawlings*, 7 East, 282. This very point has been so decided in New York, as appears from the case quoted at the bar.

But on the question, whether the survey itself be competent evidence for the plaintiff, the court is of opinion that it is inadmissible, as being a private memorial procured to be made by Starkey for his own convenience, and is not evidence for him, or for any one who claims through him. The reason for excluding such evidence is decisive, viz., that it might benefit men to include in such surveys more than belonged to them. There must consequently be a new trial.

By COURT. Judgment reversed, and a new trial awarded.

HANDWRITING, EVIDENCE OF.—Concerning the degree of acquaintance with one's handwriting, and the means by which such acquaintance must be acquired, to render a witness competent to testify thereto, see *Dorsey v. Dorsey*, 6 Am. Dec. 506; *State v. Allen*, 9 Id. 616, and note; *Hammond's case*, 11 Id. 39, and note. As to when a comparison of handwriting is admissible, see *Homer v. Wallis*, Id. 169, and note; *McCorkle v. Binns*, Id. 420.

The principal case is approved in *Dancy v. Sugg*, 2 Dev. & B. 515, as to the inadmissibility of a survey or declaration made by a deceased person, to prove a boundary in behalf of a party claiming through such deceased person.

PEARSON v. NESBIT.

[1 DEVEREUX'S LAW, 815.]

PARTY CAN NOT BE PLAINTIFF AND DEFENDANT in the same cause. Hence, a confession of judgment by executors to a firm of which one of them is a member, is erroneous.

WRIT OF ERROR IS A PROPER REMEDY in such a case.

APPEAL from a judgment of the superior court, reversing a judgment confessed by the present plaintiff, Elizabeth Pearson, and Jesse A. Pearson, deceased, as executors of Richmond Pearson, the plaintiff's late husband, in an action brought by Nesbit & Co., of which firm the present defendant is surviving partner. It appeared that Jesse A. Pearson was a member of the said firm of Nesbit & Co. at the time the judgment was con-

fessed; that the said Jesse died after said judgment, and after a return of execution thereon, *nulla bona testatoris*; and that the defendant, a surviving partner, caused a *scire facias* to issue to the plaintiff to charge her *de bonis propriis* on the judgment. The plaintiff afterwards filed an affidavit setting forth the above facts, and that she had never any of the assets of Richmond Pearson, and moved, 1. For a writ of error *coram nobis* to reverse the judgment; or, if that was not a proper remedy, 2. For an order vacating the judgment. The defendant pleaded, 1. *In nullo erratum est*; 2. That if there was error it was waived by the confession of judgment. The court below made an alternative order reversing the judgment for error, if error would lie; otherwise vacating it, and the defendant appealed.

Gaston, for the plaintiff.

No counsel *contra*.

HENDERSON, J. A suit at law is a contest between two parties in a court of justice; the one seeking, and the other withholding, the thing in contest. The same individual can not be, at the same time, both the person seeking and the person withholding. For it involves an absurdity that a person should seek from himself or withhold from himself. Between a corporation and the individuals composing it this identity does not exist, and the absurdity above stated is avoided; that where the same person is both plaintiff and defendant, in different rights, as for himself on the one side, and as executor on the other, this absurdity is involved. When adversary rights, as creditor and executor, or debtor and executor, meet in the same individual, the law considers the contest as settled, at least so long as the union exists. As soon, therefore, as it appears to the court that the same individual is both plaintiff and defendant, any judgment entered up in the cause is, to say the least, erroneous, and should be reversed.

I am not prepared to say whether a writ of error, or a motion to vacate, is the most proper mode of proceeding in this case; but I am satisfied that a writ of error is a proper remedy, although it may not be the only proper one.

The judgment of the superior court reversing the original judgment must be affirmed.

By COURT. Judgment of reversal affirmed.

STATE v. YOUNGER.

[1 DEVEREUX'S LAW, 357.]

EVERY CONSPIRACY TO INJURE INDIVIDUALS, or to do acts which are unlawful or prejudicial to the community, is indictable at common law.

CONSPIRACY TO DO THE ACT constitutes the offense, though no act be performed.

COMBINATION BY TWO TO CHEAT another by making him drunk and defrauding him at cards, is an indictable conspiracy.

INDICTMENT for conspiracy, the substance of which is sufficiently stated in the opinion. After a verdict for the state, the defendants moved to arrest the judgment on the ground that the facts set out in the indictment did not constitute an offense at common law. Motion overruled and judgment on the verdict, from which the defendants appealed.

The Attorney-general, for the state.

No counsel *contra*.

TAYLOR, C. J. It is to be decided in this case whether the facts set forth in the indictment, and which are affirmed by the finding of the jury, constitute an indictable offense at common law. The charge in substance is, that the defendants conspired together to defraud and cheat the prosecutor out of his goods; and to accomplish that end, they procured him to be intoxicated, and engaged him to play at cards, when they fraudulently cheated him out of three hundred dollars. Conspiracy was anciently confined to imposing, by combination, a false crime upon any person, or conspiring to convict an innocent person, by perjury and a perversion of the law. But it is certain that modern cases have extended the doctrine far beyond the old rule of law, and it has long been established that every conspiracy to injure individuals, or to do acts which are unlawful or prejudicial to the community, is a conspiracy and indictable. As where divers persons confederate together by indirect means to impoverish another; or falsely and maliciously to charge a man with being the reputed father of a bastard child; or to maintain one another in any matter, whether it is true or false: 1 Hawk. 446, sec. 2. Playing at cards for money is in itself unlawful, and where two persons conspire together to make an unlawful act the means of doing an injury to, or impoverishing another, it is stronger than many of the cases which have been held indictable. Even a bare conspiracy to do a lawful act, to an unlawful end, has been held indictable, though no act was done in consequence thereof: 8 Mod. 321.

The conspiracy to do an act constitutes the offense, though if an individual only were concerned, the offense must have been complete before the indictment would lie. The line of distinction is accurately marked in *Wheatly's case*, 2 Burr. 1125, between cheats perpetrated by an individual, and which can only be effected by false tokens, and a conspiracy between two or more to commit the like offense. The indictment was at common law, and against a brewer, for that he, "intending to deceive and defraud A. W. of his money, falsely, fraudulently, and deceitfully sold and delivered to him sixteen gallons of amber, for and as eighteen gallons of the same liquor, and received fifteen shillings, as for the eighteen gallons, knowing they were only sixteen gallons." The court were clearly of opinion that the offense was not indictable, but only a civil injury, for which an action lay to recover damages. Lord Mansfield said, it amounted only to an unfair dealing, and an imposition on this particular man, by which he could not have suffered, but from his own carelessness in not measuring it; whereas, fraud, to be the object of criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy. There are various instances of convictions in the books for cheats in their nature private, and without false tokens, but they were indicted as conspiracies; nor could the indictments have been sustained without this circumstance: *Regina v. McKarty*, 2 Ld. Raym. 1179¹; 2 East's P. C. 823. There is a very strong case in 1 Mass. 478, where the defendants were indicted and convicted of a conspiracy to cheat the prosecutor out of his goods by obtaining credit for them, on the false assertion that they were about to set up a retail store. No motion was there made in arrest of judgment. Upon the whole, I think this indictment sustainable on common law principles; and that it describes a complicated offense, much more aggregated than many of the cases in the books, on which convictions have taken place; for here is a cheating by means of a conspiracy, making the prosecutor drunk, and playing at cards.

By COURT. Judgment affirmed.

CONSPIRACY, WHAT IS INDICTABLE AS.—See, on this point, *State v. Buchanan*, 9 Am Dec. 534. In an indictment for a conspiracy to cheat, no overt act need be set forth: *Commonwealth v. McKisson*, 11 Am. Dec. 630.

1. *Regina v. Mackarty*, 2 Ld. Raym. 1179.

STATE v. MUMFORD.

[1 DEVEREUX'S LAW, 519.]

INDICTMENT FOR PERJURY charging generally that the false oath was material to the trial of the issue upon which it was taken, without showing particularly how it was material, is sufficient.

GENERAL AVERMENT OF THE FALSITY of the testimony is insufficient; each fact falsely sworn to must be distinctly negatived.

INDICTMENT for perjury as follows: "The jurors, etc., present that heretofore, etc., Keziah Mumford, etc., came before Hugh McKenzie, Esq., then and yet being one of the justices, etc., and then and there upon her oath charged one Alfred Noble, etc., with having assaulted, stricken, and bruised one Henry Mumford. And the jurors, etc., do further present that upon the examination of the said Keziah Mumford, etc., upon her oath aforesaid, touching and concerning the alleged assault by, etc., certain questions then and there became and were material, that is to say, whether Alfred Noble did strike her husband, Henry Mumford, with a stick across the back at the last time he and V. P. wrestled, and whether the blow across the back with a stick was given immediately as they fell. And the jurors, etc., do further present that the said K. M., wickedly devising and intending unjustly to aggrieve the said A. N. and procure him to be imprisoned, and kept in prison for a long space of time, etc., before the said H. M., then being, etc., the then said K. M. did then and there take her corporal oath, etc., before the said, etc., he, the said H. M., then and there having sufficient and competent power, etc., to administer an oath to the said, etc., and that the said K. M. not having, etc., then and there before the said H. M., etc., upon her oath, etc., falsely, etc., did depose, say, swear, etc., among other things in substance and to the effect following, that is to say, that N. (meaning the said A. N.) did strike her husband, Henry Mumford, with a stick across the back at the last time he (meaning the said Henry Mumford) and V. P. (meaning, etc.) wrestled, and that the blow (meaning the blow with the stick across, etc.) was given immediately as they (meaning the said Henry, etc.) fell, whereas in truth and in fact the said A. N. did not strike her husband, Henry Mumford, with a stick across the back at the last time he, the said Henry Mumford, and V. P. wrestled, and whereas in truth and in fact the blow was not given as they, the said, etc., fell, etc."

Verdict for the state. Motion in arrest of judgment on the

ground that the assignment of perjury was not sufficiently certain, and in effect was nothing more than a negative pregnant. Judgment arrested, and the state's solicitor appealed.

Devereux, for the state, cited: *Rex v. Aylett*, 1 T. R. 63; *Rex v. Atkinson*, Bac. Ab., Perjury, 6; *Rex v. Perrot*, 2 Mau. & Sel. 385; *Rex v. Dowlin*, 5 T. R. 311, 318; *Rex v. Grieve*, Ld. Raym. 261; Stark. Cr. Pl. n. g. 134; 2 Chit. Cr. L. 309, 352, 353.

TAYLOR, C. J. The objection taken in arrest of judgment is founded on the assumption that the only material inquiry before the justice was whether Noble had assaulted Mumford or not the day specified, and that whether he struck him on the back or not at the last wrestle, was irrelevant and unconnected with that question; that the assignment of perjury in the circumstances is consistent with the belief that the defendant might have sworn truly as to the principal fact, viz., the assault. This presents two questions: whether the materiality of the inquiry is sufficiently stated in the indictment; and whether the assignment of perjury is properly and distinctly made.

It is laid down as a rule, which I find nowhere controverted, that it should appear on the face of the indictment that the oath taken was material to the question depending, not by setting forth the circumstances which render it so, in describing the proceedings of a former trial, but by a general allegation that the particular question became material. In *Aylett's case*, a leading one on this subject, it is stated that it became a material question on the hearing of the complaint, and the hearing of that is stated in general terms: 1 T. R. 66. In the *King v. Dowlin*, the question was much debated. It is there stated that the question became material on the trial in the same general terms that it is stated here, and the trial is referred to in this manner, that, "at such a court, J. R. was in due form of law tried upon a certain indictment, then and there depending against him for murder." Dowlin was a witness against J. R. on that trial, and the perjury was assigned in his swearing that "he had never said he would be revenged of the said J. R. and would work his ruin." On this part of the case, it was argued on behalf of Dowlin that all those facts ought to be stated in the proceedings against J. R. which were necessary to show that the jurisdiction was competent, that there was something to be tried, the materiality of the question to that point, and the falsity of the oath. This objection is thus directly met by Lord Kenyon: "But it has been objected that it was necessary

to set forth in the indictment so much of the former trial as will show the materiality of the question on which the perjury is assigned. If it were necessary, and if the question arose on the credit due to the witness, the whole of the evidence given before must be set forth; but that has never been held to be necessary, it always having been adjudged to be sufficient to allege generally that the particular question became a material question. But here it is averred that the question on which the perjury was assigned was a material question, and the jury have found it so by their verdict:" 5 T. R. 319.

In this indictment the warrant and examination before the magistrate are stated, and the general allegation of the materiality of the question is in conformity with the best forms, and considered in reference to the act on this subject, Rev. ch. 383, appears to me unexceptionable. The matter sworn to by the defendant is contradicted in the assignment of perjury, specially and particularly, and in the words in which it was sworn. A general averment upon the whole matter, that the defendant swore falsely, is not sufficient; it should be specific and distinct, to the end that the defendant may have notice of what he is to come prepared to defend: 2 M. & S. 385. And the whole matter of the defendant's false testimony must be set forth; and if the least part of one entire assignment be improved, she could not be convicted. The offense charged consists in the whole, and not in any part of the assignment. And this, in my opinion, obviates the necessity of any opinion as to how far perjury may be committed, if the false oath has a tendency to prove or disprove the matter in issue, although but circumstantially: or how far the fact sworn to, though not material to the issue, must have such a connection with the principal fact as to give weight to the testimony on that point. These views of the subject could, in this case, only be properly presented to the court trying the cause. I think the conviction is right.

By COURT. Judgment reversed.

INDICTMENT FOR PERJURY, SUFFICIENCY OF.—See *Respublica v. Newell*, 2 Am. Dec. 381. As to the materiality of the false oath, see *State v. Hattaway*, 10 Id. 580.

CASES
IN THE
SUPREME COURT
OF
OHIO.

GUYNNE v. CITY OF CINCINNATI.

[3 OHIO, 24.]

THERE IS NO DOWER in lands given for public uses.

PETITION in chancery for dower in a market-house in the city of Cincinnati. John H. Piatt, the former husband, now deceased, of Mrs. Guynne, in conjunction with other owners of the land in a certain square, agreed to open a way or street through the square, upon which a market-house was to be erected. The agreement was carried into effect under an ordinance of the city council, and the market-house erected. The building stood on lands given by Piatt, a space for a street remaining open on either side. In his life-time Piatt conveyed other tracts in the same square, and his wife joined in the conveyance. But it did not appear that any conveyance was made of the ground covered by the market-house, either by Piatt or by his wife. The cause was submitted on these facts.

Este and Storer, for the complainant, argued that the sale, by a husband, of land for a market space, could not divest the wife of her dower; that this was not like the case of a road in this country, or of a castle in England; and that it was not a condemnation of lands for public use, but a conveyance by private contract, in which the wife did not join: 1 Co. Lit. (Thos. ed.) 370; 7 Mass. 14, 291; 15 Johns. 483; 2 Id. 357; 2 Mass. 127; 4 Id. 427; 1 Yeates, 167; Perkins on Con. 341; Fitz. N. B. 142; 1 Roper, 240.

Fox, contra, cited: Com. Dig. tit. Grant, E.; 10 Coke, 63;

Co. Lit. (Thos. ed.) 239, note, 13; 8 Johns. 59; 15 Id. 447; 7 Mass. 6; 6 Id. 332, 454; 6 Binn. 509.

By COURT. The street, including the ground in question, was opened, and the market-house established by an agreement with the owners of the ground, and under an ordinance of the city council of Cincinnati.

The whole space became subject to the same public regulations as the grounds originally laid out in the streets, and for other public uses and purposes. The claim of dower must stand upon the same principles that it would stand in any case to the ground thus appropriated. The counsel for the complainants insist that it is a case to be distinguished from that of public grounds condemned for public uses; but the court are unable to comprehend the distinction. When a town is laid out, the law requires the plat to be recorded, and by such record, the streets become public highways, and the title to the grounds set apart for public uses is vested in the county for the purposes contemplated. The uses thus created are inconsistent with the exertion of any private right, while the use remains; consequently, all private rights must be either suspended or abrogated. Such has been the general understanding, not only in this state, but, so far as we are informed, in other states also. A claim for dower in the streets of a town, or in the public jail, court-house, or public offices, would be a novel one, and if sustained, could not be enjoyed without defeating the original purpose and present use of the grant. It can not be admitted, for the same reason that it is not admitted to a castle in England. It could yield nothing to the support of the widow by a direct participation in the possession, without such an interference with the public right, to control the whole subject, as to render its enjoyment inconvenient and unsafe, if not impossible.

The bill must be dismissed.

ZERBY v. WILSON.

[3 OHIO, 42.]

THE SUBSCRIBING WITNESS MUST BE PRODUCED to prove the execution of a writing, or his absence accounted for.

ASSUMPSIT on a written contract. The opinion states the case.

H. B. Curtis, for the plaintiff, in support of a motion for a new trial.

Purdy, contra.

By COURT. The plaintiff relied upon a written contract, or lease in writing, not under seal, as the foundation of his action. By his plea, the defendant put the fact of execution or making the writing in issue, and the plaintiff to prove it offered the confessions of the defendant in evidence, without calling the subscribing witness, or accounting for his omission to do it. The court overruled the evidence, and this motion is now made upon the ground that in so overruling it the court erred.

No rule of evidence is better established than that which requires a subscribing witness to a written instrument to be produced when its execution is put in issue, and is to be tried. Or if he can not be produced, to show some legal reason why this is impracticable as a foundation for the admission of secondary evidence. The plaintiff's counsel rely upon the case of *Hall v. Phelps*, 2 Johns. 451, as establishing and sustaining a different doctrine. It is unnecessary to say how far we should be governed by that case as an authority, did we consider it full in point, because we do not so consider it. In a subsequent case decided in the same court, *Fox v. Reil*, 3 Johns. 477, the same question again came up, and the grounds of the first case, and the extent of the decision, are examined and explained in such manner as much to weaken its authority. *Hall v. Phelps* was a case upon a promissory note; *Fox v. Reil* was a debt upon a bond. In the latter case, the confessions were rejected, and in giving the opinion of the court, Kent, C. J., states distinctly that he concurred in the decision in *Hall v. Phelps*, upon the ground that it was a case of commercial paper, and that the English rule was exceedingly inconvenient when applied to that description of written obligation. He says, he recollects no case where it was ever applied to a specialty.

The case before us is not a specialty, but it is not, nor does it bear any resemblance to commercial paper. It is a contract in relation to the realty; it conferred upon the lessee a qualified interest in land, and the solemnities of execution are in their nature as important as the execution of a bond for the payment of money, or of any specialty short of a deed for the conveyance of land. It is a case much more strongly assimilated to that of *Fox v. Reil*, than that of *Hall v. Phelps*, and we are of opinion that it falls within the rule of the latter case. The evidence was properly rejected, and the motion for a new trial must be overruled.

WILKINS v. PHILIPS.

[3 OHIO, 49.]

STATUTE OF LIMITATIONS.—If one of the parties to a writ of error is within the saving clause of the statute of limitations, the case is saved for all the parties.

WRIT of error. Plea, the elapse of more than five years since the rendition of the decree and the emanation of the writ. Reply, that one of the plaintiffs in error was an infant at the time and until after the suing out of the writ of error. Demurrer to this declaration and joinder.

O. Parish, in support of the demurrer, contended that 4 T. R. 516, and 7 Cranch, 156, were conclusive.

Atkinson and Leonard, contra, cited 4 Day, 265, 310, 465; 2 Bibb, 371; Hardin, 365; Co. Litt. 163, B; 2 Wheat. 316.

By COURT. The case of *Marsteller and others v. McLean*, 7 Wheat. 156,¹ was decided upon the authority of the case of *Perry and others v. Jackson and others*, 4 Term, 516. In this latter case, Lord Kenyon asserts that it is the first time the question had been brought up for decision whether, where the saving clause of the statute of limitations protected only a part of those joined in the action, all the plaintiffs could claim its protection. It decided against the protection, but upon grounds by no means satisfactory to us. The case was one of partnership, which, we think, was sufficient, of itself, to have warranted the decision made. This is in part relied upon, and the decision is, in part, put upon the ground of the grammatical construction of the statute. The supreme court of the United States ground themselves upon this authority. Highly as we respect the opinions of this tribunal, we can not adopt them in the construction of our own statutes, where they are at variance with our own judgments. We consider the reasoning of the courts of Connecticut and Kentucky, cited by the other side, as more consonant to the general advancement of justice. It is our opinion, that, if any one of the parties who sue a writ of error is within the proviso that takes the case out of the statute of limitations, the case is saved for all the parties. The demurrer to the replication is overruled, and cause remanded for further proceedings.

In *Kay v. Watson*, 17 Ohio, 27, it is decided that a complainant, in a bill of review, who was a *feme-covert* when the decree was rendered, may file a

1. *Marsteller v. McLean*, 7 Cranch. 156.

bill of review within five years after the disability is removed; but that if she joins in a bill with others, who are barred by lapse of time, when their interests are capable of severance, the bill will be dismissed as to all. The effect of the statute of limitations, when several persons were once entitled to maintain an action, and some, but not all of them, have been barred by the statute, is discussed in Freeman on Cotenancy and Partition, sec. 373 to 378.

RHODES v. LINDLY.

[3 OHIO, 51.]

NOTE PAYABLE IN MERCHANDISE to bearer is not negotiable.

ASSUMPSIT on a note given by Lindly to Hezekiah Rhodes or bearer, promising to pay fifty dollars at a day subsequent, "in good merchantable whisky, at trade price." The plaintiff claimed to recover as bearer, under an assignment and delivery of the note to him. The defendant demurred, that the note was not negotiable, and on judgment being given against him, he prosecuted a writ of error.

Webb, for the plaintiff in error.

By COURT. At the common law, this paper was not assignable; neither is it assignable under our statute. The plaintiff admits this, but claims to recover, on the ground that, being made payable to bearer, any person who is the actual *bona fide* owner, may maintain the action as bearer. Were it a note for money, this position would be a correct one. But that doctrine has never been applied to executory contracts for the delivery of property, or for the performance of any particular act.

The case of *Geddes v. Byington*,¹ decided upon the circuit at Ashtabula (2 Ohio, 228) is supposed to have settled the doctrine differently. This inference is deduced, not from the point decided, but from some remarks of the judge in giving the opinion. These were only intended to apply to a note for the payment of money, made payable to a payee or bearer. It was only to that point that the attention of the court was directed in argument. The negotiable character of the note was not made a subject of inquiry by either party. The plaintiff in error claimed a reversal, on the ground that the right of the original payee did not appear, by the declaration, to have passed to the holder by assignment, delivery or otherwise, and that ground being considered sufficient for the purpose, the judgment was reversed without further examination. In this case, the direct question is

1. *Byington v. Geddings*, 2 Ohio, 228.

presented, whether such a contract as this can be so transferred as to authorize a third person to maintain a suit in his own name. Our unanimous opinion is, that no such right can be transferred.

The judgment must be reversed, and judgment be given for the defendant.

THE SUBJECT OF WHAT INSTRUMENTS ARE NEGOTIABLE is considered in the note to *Woolley v. Sergeant*, 14 Am. Dec. 419, wherein cases are collected deciding that one element of the negotiability of an instrument in writing is, that it should be payable in money.

POTTS v. RIDER.

[3 OHIO, 70.]

ONE DESCRIBING HIMSELF AS AGENT, but who covenants as in his own right, may maintain an action against the covenantee who enters and enjoys the premises.

COVENANT. The question arose upon the construction of the covenant, and was submitted on a general demurrer to the plaintiff's declaration. The covenant, at the opening, read: "By and between Samuel Potts, acting as the agent of Nathan Harper & Co., of the one part, and John Rider on the other part, witnesseth." Throughout the whole covenant all the stipulations were personal to Samuel Potts, and on his part personal to the defendant; and Samuel Potts executed the covenant in his own individual character. The declaration alleged that the defendant had entered into the premises leased and enjoyed them, and claimed to recover for the occupation. Defendant demurred.

Coffin, in support of the demurrer. Where an attorney executes a deed or other writing in his own name, though stated to be for another, it is void, and no action can be sustained thereon: 1 Swift's Dig. 31; 2 Ld. Raym. 1481; 9 Coke, 77; 1 Str. 705; 6 Johns. 94. An action on a contract must be brought by the party in whom the legal interest is vested: 1 Chit. 3; 8 T. R. 332; 1 Hen. & M. 471.

D. L. Collier, contra, cited 11 Mass. 27, 54, 288, 292; 12 Id. 137.

By COURT. There has been some diversity of opinion amongst us upon the question presented in this case; but a majority of

the judges have come to the conclusion that the action may be sustained by the present plaintiff.

The defendant contracted personally with the plaintiff to do certain things, and accepted the personal agreement of the plaintiff as an equivalent. Of this contract the defendant has had the benefit. He entered and enjoyed the leased premises, and there is no justice in permitting him now to say that the contract was void. The recitation in the covenant that the plaintiff acted in the character of an agent, does not, of necessity, control the other parts of the agreement. The fact is inconsistent with the personal covenants between the parties, which assume for Potts a different character; and it were safer to consider the words in reference to the agency as surplusage than to give them the effect of rendering void the contract. By adopting this construction effect is given to everything respecting which the parties contracted, and injury is done to no one. The demurrer is overruled, judgment entered for the plaintiff, and the cause remanded for further proceedings.

BURNET v. CINCINNATI.

[8 OHIO, 73.]

INJUNCTION TO STAY TAX SALE of city lots assessed by the city council of Cincinnati, will lie.

BILL in chancery for an injunction to restrain the marshal from selling certain lots, belonging to the complainant, for a city assessment of a tax to improve the streets. The bill set out the complainant's title to and possession of the lots, and the nature of the assessment, alleging that it had not been made in accordance with the charter and ordinances, but was illegal and void. The injunction was allowed in the common pleas. On demurrer to the bill, it was dismissed *pro forma* and brought to this court on appeal.

Storer, in support of the demurrer, insisted that the bill showed no grounds for relief, the complainant's title not being contradicted, no act of trespass being committed or threatened, and no irremediable injury anticipated to the premises by the advertisement in the newspaper; and that there was a plain and adequate remedy at law through the medium of a certiorari: *Fitz. N. B.* 247; *1 Salk.* 145; *Id.* 609; *Groenvelt v. Burwell*, *Id.* 147; *Lawton v. Comm. of Cambridge*, *2 Cai.* 181, 182; *Wildy v. Washburn*, *16 Johns.* 50; *Moers v. Smedley*, *6 Johns. Ch.* 30.

V. Worthington and N. Wright, contra. The bill sets out grounds for relief: "Any person having both the legal title to and possession of lands, may institute a suit against any other person setting up a claim thereto:" Laws of Ohio, vol. 22, 77. The remedy by certiorari suggested by defendant, is not competent in this instance; the order of the council was a legislative act, which can not be reviewed by a judicial tribunal. All the cases referred to by opposing counsel, recognize this distinction; and so, also: *Kinderhook v. Claw*, 15 Johns. 538; *Wildy v. Washburn*, 16 Id. 50; *Rhulman v. Respublica*, 5 Binn. 26; *Le Roy v. New York*, 20 Johns. 430. Relief has been granted in cases similar to the present: *Couch v. The Ulster and Orange Turnpike Co.*, 4 Johns. Ch. 26; *Varick v. New York*, Id. 53; *Gardner v. Newburgh* 2 Id. 162 [7 Am. Dec. 526]; *Shand v. Aberdeen Canal Co.*, 2 Dow, 519; *Belknap v. Belknap*, 2 Johns. Ch. 463 [7 Am. Dec. 548].

By COURT. The bill, in this case, represents that under a proceeding altogether illegal and void, but, nevertheless, under legal color, the defendants are about to sell a part of the real estate of the complainant, and prays the interference of the court, in the exercise of its chancery powers to restrain them by injunction. The demurrer, and the argument in support of it, admit the truth of the allegations, and deny that this court can aid the party. If this be a tenable position, it results that public officers, having authority to operate upon the property of their fellow citizens, must be permitted to proceed, however illegal, unjust, or oppressive their conduct may be. It follows, too, that the property of a citizen may be exposed to sale, under circumstances that render it impossible for the parties to know whether a title can pass or not. Thus involving great hazard to all concerned, and perplexing the titles to real estate, for no beneficial purpose to any person whatever. If such be the rule of the law, we must so administer it. But nothing short of a series of repeated adjudications would be sufficient to demonstrate that the law is so settled.

The authorities which have been referred to, do not lead to the conclusion insisted upon by the defendants. They all proceed upon the principle that in very many this court may interpose to prevent mischief, and to protect individuals in the enjoyment of their rights. Where aid has been decreed, it has always arisen from the circumstances of the particular case. And the confusion and seeming contradictions in the cases are

occasioned by the dicta of the judges, and not by any confliction in the principle decided.

In regard to real estate, it is well established that chancery may interpose by injunction, to prevent what is considered as destruction. But destruction, in the sense used, does not mean annihilation. It means no more than that injury which greatly impairs its intrinsic value. In a city the sale of part of a lot for assessments may often be very destructive to the interest of the proprietor, though no title passed by such sale. A cloud would be cast upon the title, which litigation only could remove, and until removed, the property might be valueless to the owner, subject too, during the period of litigation, to additional assessments and embarrassments.

When an assessment of a tax is made and its legality disputed, the uncertainty attendant upon the final result, puts the estate upon which it operates in imminent jeopardy. If no title passes by a sale, the party has a remedy at law. He can defend his possession; but if title do pass, he is remediless altogether. A mode, therefore, of deciding the question before any right is effected, is safest for all parties. It was upon this ground the court entertained jurisdiction in the case of the *United States Bank v. Schultz*, from which, in principle, this case is not distinguishable. The defendants concede that if a sale were made this bill might be sustained under our statute. To sustain it now, is clearly within its letter. A claim is set up, not to enter in and enjoy under the title, but to create a title under which another may so enter. Setting up a claim to dispose of the title, is "setting up a claim thereto," which are the terms employed in the statute. The case is clearly within the mischief intended to be remedied, as it is within the words of the law. The power to interpose might be safely grounded upon the statute alone. But we think it stands upon the general principles that govern the court, with respect to injuries to which no other adequate remedy can be extended.

Consequences that might ensue in respect to the collection of revenue, furnish no reason why the court should not interpose. The application for an injunction is addressed to the sound discretion of the judge who allows it, and there is no reason to apprehend that it will be allowed upon trivial grounds. The case of the *Bank United States v. Osborne*, 9 Wheat. 738,¹ is a case directly in point of enjoining the collection of a tax. That case was most earnestly litigated, and yet the counsel who resisted

1. *Osborn v. U. S. Bank*, 9 Wheat. 738

the injunction did not attempt to maintain that the jurisdiction could not be sustained on the ground that it interfered with the collection of the revenue.

We overrule the demurrer, and send back the cause, at the suggestion of the defendants, for further proceedings.

Judge Deady, in *Coulson v. City of Portland*, Deady, 481, 491, says that the modern cases do not appear to go the length of *Burnet v. Cincinnati*. It was there decided that equity had no power to restrain a municipal corporation from the imposition and collection of a tax under a void ordinance, on the complaint of a single property holder therein: See *McCoy v. Chillicothe*, *post*.

BACKUS' ADMINISTRATORS v. MCCOY.

[3 OHIO, 211.]

THE COVENANT OF SEISIN RUNS WITH THE LAND when the covenantor was in possession at the time of the conveyance, claiming title.

THE COVENANT OF SEISIN DOES NOT PASS with the land where the grantor was not seised, either in deed or in law, at the time of conveyance. In such case the covenant is broken immediately.

SEISIN IN FACT, with claim of title, will sustain the covenant so long as the grantees have such seisin, although the covenantor was a disseisor.

DAMAGES FOR THE BREACH of the covenant of seisin is the consideration paid and interest.

COVENANT brought by the administrators of Backus. The breach alleged was that of the covenant of seisin, without alleging an eviction, or specifying any damage sustained. The defendant pleaded in bar that the premises were sold on execution on a judgment against the intestate, and conveyed by a sheriff's deed to the purchaser before any damage was sustained by the intestate. The replication averred that the alienation was made without the consent of the intestate, and for a sum less than the fair value. The defendant demurred generally.

Ewing, in support of the demurrer.

Wilcox and J. R. Swan, *contra*.

By Court, SHERMAN, J. This action being brought to recover damages for a breach of the covenant of seisin, in a deed from the defendant, McCoy, to the plaintiffs' intestate, the counsel have not confined themselves to the question necessarily growing out of the demurrer, but have argued the general questions of when, under what circumstances, and to what extent the grantor in a deed is liable under the covenant of seisin. This covenant is one of very general use in the conveyances of land

in this state, and it is important that all persons should understand its nature: the liability of the grantor thereon, and the security the grantee thereby acquires. This being the first time an action founded on this covenant alone, unconnected with covenants of the grantor's right to sell, for quiet enjoyment, or against incumbrances, has come before the whole court for adjudication, we have not confined ourselves to the determination of those questions alone arising from the demurrer.

The covenant of seisin is made for the benefit of the grantee in respect of the land. It is not understood as a contract in which the immediate parties are alone interested, but as intended for the security of all subsequent grantees. It is usually extended in terms to heirs and assigns as well as executors. If it can justly be considered as a real covenant, it will be annexed to and run with the land, and either go to the assignee, or descend to the heir, so long as the estate, such as it may be, to which the covenant is annexed, is in possession of the covenantee, or those claiming under him. But if the covenant of seisin is strictly a personal covenant, as it respects the course in which it shall go to the representatives of the covenantee, and must be broken, if at all, the moment the deed is executed, it can neither go to the assignee nor descend to the heir. The right of the grantee in such case would be a mere right of action for the recovery of damages, and upon his death would go to his personal representatives.

The English authorities, though not numerous on the covenant of seisin, show that so long as the grantee, or those claiming under him, remain in possession of the land, the covenant of seisin will attend and run with the land, and that the heir or grantee, if evicted by paramount title, can recover upon this covenant. In Coke's Entries, 111, cited 4 Johns. 74 [*Hamilton v. Wilson*, 4 Am. Dec. 253], a case is reported in which it was held that the heir might sustain an action on the covenant of seisin, he having been evicted after the death of his ancestor, who entered in his life-time and died seised. In *Lucy v. Livingston*, 1 Vent. 175;¹ S. T., 2 Lev. 26, which was an action by the executors on the covenant for the quiet enjoyment, the breach assigned was that the plaintiff's testator was evicted in his life-time. It was held by the court, "that the eviction being to the testator, he can not have an heir or assignee of this land, and so the damages belong to the executors, for they represent the person of the testator." In the recent case of

1. *Lucy v. Livingston*, 1 Vent. 175.

Kingdon executor v. Nottle, 1 Mau. & Sel. 355, the court held that the covenant of seisin was a real covenant running with the land, and would pass with the estate to the assignee, or devolve upon the heir, and that the executor could not sustain an action without showing an eviction, or some special damage sustained by the testator. In *Kingdon v. Nottle*, 4 Mau. & Sel. 53, the devisee brought his action upon the same covenant and recovered, the court repeating the same doctrine that the covenant of seisin is a real covenant and runs with the land. In *King v. Jones et al.*, 5 T. R. 418, the grantor covenanted that he would make further assurance upon the request of the purchaser. The ancestor of the plaintiff requested further assurance, which was refused, when he died; and his heir, the plaintiff, was afterwards evicted by title paramount, and it was held that the heir could sustain an action, that it was a covenant running with land, and the ultimate damage not being sustained in the life-time of the ancestor, the covenant with the land devolved upon the heir. The decision was affirmed on error in the court of the king's bench: 4 Mau. & Sel. 188.

It seems to be well settled by these recent decisions that when the heir or assignee acquires any interest in the land, however small, by even an imperfect or defective title, he shall be entitled to the benefit of all those covenants that concern the realty; and where he has been evicted, by paramount title, he is the party damnified, by the non-performance of the grantor's covenants, and for such breach may sustain an action. This seems to be reasonable in itself, as well as in accordance with the terms of the covenant. By considering the covenant of seisin as a real covenant, attendant upon the inheritance, it will form a part of a every grantee's security, and make that which otherwise must be either a dead letter or a means of injustice, a most useful and beneficial covenant. A dead letter, when an intermediate conveyance has taken place, between the making of the covenant and the discovery of the defect of title, and the covenantee refuses to bring suit. A means of injustice, when, after the covenantee has sold and conveyed without covenants, he brings and sustains an action on the ground that the covenant was broken the moment it was entered into, and could not, thereafter, be assigned. When lands are granted in fee by such a conveyance as will pass a fee, and the grantor covenants that he is seised in fee, we can perceive no objection, legal or equitable, to this covenant as well as the covenant of warranty, passing with the land so long as the purchaser and

the successive grantees under him remain in the undisturbed possession and enjoyment of the land. We are aware that the supreme court of New York have taken somewhat of a different view of this covenant; but highly as we respect the decisions of that court, and much as we regret now to differ from them in opinion, we feel bound to express the result of our own judgments in every case submitted to our consideration.

The supreme court of Massachusetts, 2 Mass. 433 [*Marston v. Hobbs*, 3 Am. Dec. 61], have held that a seisin in fact of the grantor, at the time the deed was executed, was a sufficient compliance with the covenant of seisin in the deed. This determination appears to us to be founded on sound and correct principles. If the grantor is in the exclusive possession of the land at the time of the conveyance, claiming a fee adverse to the owner, although he was in by his own disseisin, his covenant of seisin is not broken until the purchaser, or those claiming under him, are evicted by title paramount. He has a seisin in deed, as contradistinguished from a seisin in law, sufficient to protect him from liability under his covenant so long as those claiming under him may continue so seised. Actual disseisin, or the actual adverse possession of the lands of another, is the commencement of a right which by lapse of time may ripen into a perfect title in the disseisor or possessor; and during the time that the grantee of such disseisor remains in the undisturbed possession of the lands by reason of the conveyance of such disseisor, he can not maintain an action upon the covenant of seisin. No breach of such covenant will have taken place if the grantor was seised in deed at the time of the conveyance, however that seisin may have been acquired. If the grantor, at the time of executing this conveyance, was in possession of the lands, either as disseisor or under color of title, it can not be said that he was not seised of an estate in the premises. When the grantor is not seised, either in deed or in law, at the time of conveying, the covenant of seisin must be broken at the moment of executing the deed containing it, and becomes thereby a mere chose in action, and no longer annexed to or passing with the land. This is the case when the grounds are vacant, and the grantee has no title. But when the grantor is, at the time of the conveyance, in possession, under color of title, claiming a fee, the covenant of seisin is a real covenant annexed to the land, and passes with it to the heir or assignee, until he who has the paramount title may assert it, and evict the person in possession, when it be-

comes a mere claim to damages, to be enforced by him who has been evicted, and like any other, when in action, no longer assignable at common law. The rule of damages under a covenant of seisin, where a breach has been shown, is the consideration money and interest. It is the value of the land, as ascertained by the parties, and the money comes in lieu of the land, lost by the non-performance of the covenant. Damages can not be awarded, either for the increased value of the land, or the improvements made. In the latter the legislature have provided an ample remedy in favor of the occupying claimant; and awarding the former, would in many cases inflict a severe penalty on grantors who conveyed in good faith, having perfect confidence in their title to the lands they conveyed. If the grantor has practiced any fraud in the sale, the grantee may have his remedy by an action on the case in the nature of a writ of deceit. It is not unfrequently the case that in conveying large tracts of land, especially in the Virginia military district, the grantor is seised, in the manner he covenants, of part only of the lands sold, and by means of interfering claims, defective entries, or other causes, he has no valid title to the residue. The measure of damages in such a case is the same proportion of the consideration money and interest as the value of the lands of which the grantor was not seised is to the value of the whole, the consideration money being considered the value of the whole premises. The pleading in this case having terminated in a demurrer to the plaintiff's replication, has made it necessary to look into those pleadings with reference to the principles governing the covenant of seisin and the breaches assigned.

The replication is clearly bad, and is not attempted to be supported. The plea is equally bad; it neither denies nor confesses, and avoids the want of seisin of the defendant of the lands, at the time of the conveyance, the breach assigned in the declaration; but avers that before any actual damages had been sustained, the lands were sold and conveyed by the sheriff upon execution as the property of Backus, the intestate. The declaration avers generally a want of seisin by McCoy, and this averment being unanswered by the plea, it must be taken that McCoy, at the time of executing the conveyance, was neither seised in law nor deed of the premises conveyed, and, of course, the covenant was broken the moment it was entered into, and could not thereafter be assigned by the sheriff's deed, nor descend to the heirs of Backus, but must, with all other choses

in action, pass to the personal representatives. The plea and replication both being insufficient, there must be Judgment for the plaintiffs.

DAMAGES FOR THE BREACH OF THE COVENANT OF SEVERITY. — See *Gilbert v. Bulkley*, 13 Am. Dec. 57, and note; *Ela v. Card*, 9 Id. 46; *Sumner v. Williams*, 5 Id. 83; *Marston v. Hobbs*, 3 Id. 61; *Staats v. Ten Eyck*, 2 Id. 254; *Horaford v. Wright*, 1 Id. 8. In *Dickson v. Desire's Administrator*, in 23 Mo. 151, the doctrine of *Backus v. McCoy* is quoted, approved, and followed.

DIXON v. EWING.

[3 OHIO, 280.]

ON AN EXECUTION AGAINST A PRINCIPAL AND SURETY, the release of property of the principal seized will discharge the surety.

BILL for an injunction, setting forth that the complainants united as sureties on a bond with one Foot for the conveyance of a tract of land to Ewing; that they had no interest in the transaction; that the land was not conveyed; that Ewing obtained judgment on the bond, and levied execution on personal property belonging to Foot; and that this property was afterwards released from the execution, and returned to Foot, by order of plaintiff's attorney, without the knowledge or consent of the complainants. The answer admitted the facts in the bill, but denied that the property was restored to Foot by the direction of the defendants. The cause was submitted on the briefs of counsel.

By COURT. As Foot was the principal debtor, and the complainants were his sureties, the judgment-creditor was bound at least to let the law take its course, without interfering to exempt the principal debtor, or to relieve his property in such a way as to increase the risk, or eventual loss of the securities. It appears that property belonging to Foot had been taken in execution, by which the judgment might have been in part discharged, and although Foot's insolvency was notorious, this property was given up by order of the plaintiff's attorney, who must have known that by doing so, the entire debt would fall upon the sureties. This has been the result, and the question is, whether a judgment-creditor can release the property of his principal debtor, after a levy, and then enforce the collection of the entire judgment against the sureties. We are of opinion that he can not, and that these complainants are entitled to a

credit on the judgment for the value of the property so surrendered or relinquished. We do not say that Ewing was bound to pursue the principal to insolvency before he came on the sureties; but that he had no right to interpose for the protection of the principal, or his property, by his discharging either from the debt, to the injury of the sureties; and that having done so, the loss must be charged to his own account, and not to the complainants. The case is not varied by the allegation that the defendants did not, in person, authorize the release. He is bound by the acts of his attorney.

The question is not what degree of diligence is required, or what degree of negligence may be permitted in the judgment-creditor in relation to the safety of the sureties, but how far he may be allowed to injure them by his direct acts. Our statute for the relief of bail and sureties is a beneficial one, and although this case, as it now stands, is not within its letter, it is within its spirit, at least so far as injurious preferences are attempted.

But we are disposed to put the case on the ground of fraud. The release of Foot's property has operated as a fraud on the complainants by taking from them the means of protection on which they must have relied, and which alone could have induced them to incur the responsibility. They no doubt relied on the ability of Foot to perform his engagement, or to answer the consequences, and any proceeding by the judgment-creditor which has a direct tendency to defeat that calculation can not be viewed otherwise than as fraud.

After the property of the principal was in the hands of the sheriff, the sureties had a right to the benefit of it.

The judgment, therefore, must be enjoined as to the value of the property relinquished.

McCoy v. GALLOWAY.

[3 OHIO, 282.]

TO ESTABLISH BOUNDARIES, evidence of common reputation is not admissible to contradict record evidence.

COURSE AND DISTANCE MUST GIVE WAY to natural objects. But to warrant the application of this rule the natural objects must be identified.

EJECTMENT. The cause was submitted on the testimony.

Corwin and Collet, for the plaintiff.

F. and H. Dunlevy, contra.

By Court. The lessor of the plaintiff has the first entry and the eldest patent; he must, therefore, recover, if his patent covers the land in the possession of the defendant, or any part of it.

The south-west, or beginning corner of Russell's survey, under which the plaintiff claims, is sufficiently established, the south boundary line, running east from that corner, is also proved. The plaintiff's patent calls to run from the beginning east, two hundred and sixty-six and two third poles, to a sugar and ash. He now claims by a line, four hundred and eighty poles, to a hickory, beech, and oak. His third corner called for, is two beeches and an ash. The corner which he now claims, is two hickories and a beech.

It is in evidence, that when the defendant made his entry, he went to the beginning corner of Russell, and traced his south boundary, for the purpose of ascertaining the lines of his survey, but not being able to find any corner answering the calls of his location, he ran from the beginning, the distance called for by Russell, and made a corner from which he made his own entry. Russell's survey contains the quantity called for, without interfering with the entry of the defendant; but the corner he now wishes to establish will include the whole of the defendant's entry. Some of the witnesses say, that the corners now claimed by the plaintiff have been considered in the neighborhood, for many years, as the original corner of Russell's survey. It also appears, from the connected plat, that the two hickories and beech claimed by the plaintiff, as his third, or north-east corner, must have been made as a corner for Muhlenburgh's survey, of eleven hundred and twenty acres, and not as a corner for the survey of Russell. This appears to be the substance of the testimony, as far as it appears to be in any way material, and we are clearly of opinion that it does not establish either the second or third corner of Russell's survey, without which it is impossible to say that his patent covers any part of the land claimed or occupied by the defendant. The attempt to establish those corners by reputation might have been successful, if the testimony did not contradict the presumption arising from the neighborhood opinion that has been stated. It is evident that the persons who considered them as belonging to the plaintiff's survey, must have been ignorant of the calls of that survey. If they had known that the south-east corner was a sugar and an ash, and the north-east corner two beeches and an ash, they could not have believed that the hickory, oak, and beech

in the one case, and the two hickories and beech in the other, were those corners. If corners can be identified and proved by such evidence, the record testimony, which the land laws have provided for, must yield to neighborhood reports, and certainty and precision must be dispensed with.

When corners are lost they must be proved by reputation. Witnesses may be examined to show that a corner once existed; that it has been destroyed; and that it corresponded with the call of the entry or survey; but they can not be allowed to substitute one corner for another or to contradict the evidence which is of record. They cannot change a sugar tree to a hickory, or an ash to a beech.

The length of the first line, and the number of acres contained in the entry, are strong corroborating circumstances in support of the conclusion, that the corners claimed are not the corners called for. By the survey Russell's south line is two hundred sixty-six poles and a fraction of a pole, that line, as he now claims it, is four hundred and eighty poles, almost double the distance in the patent, and the quantity of lands which he demands, exceeds the quantity for which he has a patent, in the same proportion. These facts, we admit, are not conclusive. In the Virginia military district it generally happens, that the lines are longer and the number of acres greater than the calls of the patent; but it rarely happens that the discrepancy is so great as in the present case, and although these facts would not be sufficient to reject a corner, in other respects sufficiently proved, yet they afford a sufficient ground to reject a claim for a corner, supported only by a neighborhood opinion, and particularly so when that opinion contradicts the survey.

The fact that the hickory, ash, and beech are in the line of Muhlenburgh's survey, and are called for as a corner for that survey, in the absence of all proof that such a corner belongs to Russel's survey, confirms the conclusion heretofore drawn.

It is admitted that course and distance must give way to natural objects, but this rule has its limits and must be used with sound discretion. When a natural object is distinctly called for, and satisfactorily proved, it becomes a land-mark not to be rejected, because the certainty which it affords excludes the probability of mistake, while course and distance, depending for their correctness on a great variety of circumstances, are constantly liable to be incorrect. Difference in the instruments used, and in the care of surveyors and their assistants, must lead to different results. Hence it is that this rule has been

established. But in the case before us, the natural objects called for have not been proved. If the plaintiff had established his sugar and ash corner in or near the direction of his first course, and the hickory and beech corner in or near the course of his second line, those corners must have been sustained, although they might have varied from the course and distance in the patent, provided that variance were not too great to be ascribed to the causes just mentioned. But when the corner claimed by a party has no similitude to the one he has made and recorded as his land-mark, he can not aid himself by resorting to this rule. He must be governed by the converse of it, that when there is not an object called for and proved, varying from his course and distance, he must make his corners where course and distance lead him.

Other grounds were taken in the argument, but we consider it unnecessary to pursue them. The plaintiff has failed to establish his second and third corners, and is, therefore, confined to his course and distance, which do not interfere with the land claimed and possessed by the defendant.

Judgment for defendant.

HEARSAY EVIDENCE REGARDING BOUNDARY.—See the note to *Barnstine v. Eggart*, 15 Am. Dec. 628; *Coate v. Speer*, Id. 637.

HARLAN v. READ.

[8 OHIO, 285.]

TO AVOID THE PAYMENT OF A NOTE, in a suit at law, on the ground of fraud, the fraud must extend to the whole consideration.

ASSUMPSIT on a promissory note. The defendant, under the plea of non-assumpsit, offered evidence to prove that the note was given as a portion of the purchase-price of a certain farm sold to the maker by the payee; that the defendant saw a portion of the farm, but relied upon the representations of the plaintiff as regards the residue of the property; and that the representations were false. The evidence was objected to.

By COURT. To avoid the payment of a note in a suit at law, on the ground of fraud, the fraud must extend to the whole consideration. We have no rule to ascertain the extent of the partial injury sustained by the misrepresentation complained of. The jury can not make a new contract for the parties. They can not establish for them a price, or value, different from the

one agreed. There is no doubt, but that a vendor who sells by a description, is bound to make it good; and in this case, if the vendee was deceived by a misrepresentation, he might have refused to execute his contract. He might have filed a bill to avoid it, but in place of doing this, he has affirmed it. He has taken possession, with a full knowledge of all the facts, and has paid a part of the purchase-money. Under these circumstances, whatever relief he may be entitled to elsewhere, he can not avail himself of his proposed defense in the present action. We know that courts of common law, as well as courts of equity, may relieve against fraud, in any form in which their modes of proceedings can reach it; but it does not follow that a party who has acquiesced in a fraud, and thereby sustained a partial loss, may set that up as a defense to an action brought on a note for the consideration of the contract. Such a course would not only be inconvenient, but would lead to uncertain results. It would burden the jury unnecessarily. Plaintiffs would be perpetually liable to be taken by surprise, and much of the time of the court would be wasted by unprofitable disputation. Attempts have often been made to set up this kind of defense, but it has been always rejected.

GIST v. LYBRAND.

[8 OHIO, 307.]

REMOVAL OF THE MAKER OF A NOTE, before its maturity, into a different state from that where he resided at the time of its execution, will excuse the holder from making demand of payment.

NOTICE TO AN INDORSER, addressed to him at a city generally, where he was accustomed to pass part of his time, receiving letters and messages at a particular place therein, will support a verdict for the holder, although the indorser resided nine miles from the city, though there was no proof that the city post-office was the nearest one to his place of residence.

ASSUMPSIT by Gist, the indorsee, against Lybrand, the indorser of a promissory note, made by one Ware in Lybrand's favor, payable one year after date. Ware had left the state where he resided at the time of the making of the note, and could not be found by Gist at maturity. Evidence was offered to prove this fact, and admitted against defendant's objection. It did not appear that the plaintiff had made actual demand at Ware's former place of residence within the state. The evidence of notice of non-payment, given to the indorser, appears from

the opinion. Objections to the admissibility of this evidence were also overruled, and a verdict returned for the plaintiff. Motion for a new trial.

W. W. Irwin, for the defendant, contended that the removal from the state of a maker of a promissory note, would not excuse demand of payment at his former residence or place of business within the state: *Sanger v. Stimpson*, 5 Binn. 542; *Thompson v. Ketcham*, 4 Johns. 285. Counsel also objected to the sufficiency of the notice to the indorser: *Holliday v. Martinell*, 20 Johns. 168; *Snider v. Ulica Bank*, Id. 383; *Ireland v. Rip*, 11 Id. 231.

H. Stanberry, contra, in support of the position that no demand was necessary under the circumstances, cited *McGruder v. Bank of Washington*, 9 Wheat. 598; *Anderson v. Drake*, 14 Johns. 114 [7 Am. Dec. 442]; *Duncan v. McCullough*, 4 Serg. & R. 480; *Putnam v. Sullivan*, 4 Mass. 45 [3 Am. Dec. 206]. And upon the sufficiency of the notice of non-payment, counsel referred to *Mum v. Baldwin*, 6 Mass. 317; *Bank of Columbia v. Lawrence*, 1 Pet. 578; *Reed v. Paine*, 16 Johns. 218.

By COURT. We all concur in opinion with the supreme court of the United States, upon the first point in this case. In the case of *McGruder v. The Bank of Washington*,¹ cited by the plaintiff's counsel, they have settled that the removal of the maker of a note, after it was made, and before its maturity, into a different state from that where he resided when the note was made, excuses the holder from making actual demand of payment made from the maker. Whether a demand should be made at any other place, is not made a point or adjudicated upon in that case. But it seems to us a clear consequence of that decision, that such demand is unnecessary. The fact of removal commits the indorser, and dispenses with all demand, unless a particular place be appointed for the payment of the note in the note itself. In this case the evidence to prove the removal was admissible, and the jury found the fact of removal. The verdict can not be disturbed on this point.

2. The second ground urged for a new trial is, that the testimony received to prove that notice was given to the defendant of the non-payment of the note, was not admissible for that purpose. It is fully proved that the defendant resided a part of his time in the country, nine miles from the city, and a part at his mother's, in the city. But transacted no regular busi-

1. 9 Wheat. 598.

ness at either place. Notice of the protest was put into the post-office in the city, from whence a letter carrier distributed letters, who testified that he had carried letters to Lybrand from the post-office. The proof is also clear that Lybrand had directed letters and other matters of business to be left for him at his mother's. There is no evidence in this case whether there was a post-office nearer to his country residence than that of the city, and the counsel for both parties contend that this omission is in their favor. But, as the question is presented to us, we do not consider the fact very material. All the evidence received was properly admissible. Its sufficiency to charge the defendant might depend upon the facts. Proof that there was a nearer post-office would have been a sufficient answer to it before a jury. But this, instead of rendering it originally inadmissible, would be defeating it by counter proof. Its operative effect, not its admissibility, depended upon that fact, and its operative effect, too, would depend entirely upon the light in which the other facts might be considered by the jury. Should they be satisfied, from the testimony, that the notice actually reached the defendant, or that he was in the city at the time the notice was put in the post-office, and receiving letters by the carrier, the fact of a nearer post-office would be considered wholly immaterial. It is, therefore, very clear that the testimony was properly admitted. Its effect is not now before us, and it is unnecessary to express any opinion upon it.

New trial refused, and judgment on the verdict.

EFFECT OF THE REMOVAL OF THE MAKER of a note from the place where it was made, upon demand and notice: See *Fuhrman v. Loudon*, 15 Am. Dec. 642, and note.

DABNEY v. MANNING.

[3 OHIO, 821.]

POWER GIVEN TO EXECUTOR BY WILL to sell lands, when, in his opinion, sale can be made to good advantage, and to distribute the proceeds among the testator's children as they come of age, is a power coupled with an interest, and entitles the executor to the possession of the land.

PURCHASER UNDER A DECREE SUBSEQUENTLY REVERSED, who enters upon the lands purchased, is not liable in trespass for acts done while the decree was in force.

TRESPASS for breaking and entering the plaintiff's close. A case was stated containing the following facts: The plaintiff was the executrix of the will of N. G. Dabney, deceased, duly

proved and recorded, which contained the following clause: "I do will and ordain that my executors hereinafter named, do sell my farm, on which I now reside, containing one hundred and sixty-eight acres, whenever, in their opinion, they can do the same to good advantage." The plaintiff alone qualified. By other provisos of the will, the proceeds of the sale were to be distributed among the testator's children as they should arrive at age. The plaintiff adduced no other title or evidence of right of possession, but that contained in the devise. The defendants' defense was: Some of the heirs-at-law of N. G. Dabney were infants. One of them being of full age, the executrix, the plaintiff, not having sold the estate, filed a petition for partition. The land being reported incapable of division, an order of sale was made, directing N. Scott to make the sale, in these words: "It further appearing to the court here that there is no administrator on the estate of N. G. Dabney, it is ordered by the court, that N. Scott be appointed administrator, to make distribution of the avails of said land, etc. It is also ordered by the court here, that an order issue to said administrator to sell the land, in the petition described, at public vendue." Scott sold the land, and the defendants purchased. Scott executed to them a conveyance, without referring to the judicial proceedings under which he acted, but describing himself as "administrator to sell the lands and tenements of Nath. G. Dabney, late deceased." And in the covenant of title, he recites his powers thus: "I, the said Nehemiah, in my said capacity of administrator to sell the land and tenements of N. G. Dabney, late deceased, do, for myself, my heirs, etc., that at, and until the ensealing of these presents, I am in my said capacity of administrator well seized of the premises, as a good indefeasible estate in fee-simple, and have good right to bargain and sell the same in manner and form as above written." Under this deed, the defendants entered and took possession. Subsequent to the sale and conveyance, the order directing the sale on partition was reversed. The defendants then abandoned the possession.

Two questions were raised for decision: 1. Had the plaintiff such possession of the premises, as that she could maintain an action of trespass for an unlawful entry upon it? 2. Can the defendants protect themselves under the purchase from Scott?

P. W. Burr, for the plaintiff. The devise to the plaintiff was a power coupled with an interest: *Howell v. Barns*, Pow. Dev. 306; *Jackson v. Ferris*, 15 Johns. 346. There being an execu-

tor, the appointment of the administrator and all the acts under it were void: Toll. Ex. 127, 128.

Loomis and Metcalf, contra, urged that the defendants, having entered lawfully, could not be made trespassers by relation: 13 Coke, 21; 11 Id. 51; they could not be affected by the reversal of an order to which they were not parties: 3 Cai. 261.

By COURT. The testator in this case directed his executors to sell his real estate whenever, in their opinion, they could do so to good advantage. He devised the proceeds of sale to be paid in shares to his wife and children, and appointed the payments to the children to be made when they should respectively become of age. We can not consider these provisions as giving to the executors a mere naked power to sell the land; because they confide a discretion as to the time of making the sale to good advantage; and, because they are intrusted with the charge of the proceeds, until the time appointed for paying it to the legatees. The executrix had an interest in the performance of the trust thus confided to her, and she had also an interest as one of the devisees of the proceeds. For the preservation of these interests, the law entitled her to the possession of the land, from which they could not be separated. The title certainly descended to the heir, while the trust remained unexecuted, subject to be divested by the execution of the power. But the right of possession did not descend with the title; that passed with the will for the better enabling the executors to effect the objects of the testator. We are, consequently, satisfied that the plaintiff has such right of possession as enables her to sustain this action.

The laws of this state provide, that where lands descend in parcenary to heirs, some of whom may be of full age, and some minors, those of full age may petition for partition; and the power of hearing and determining upon this petition is conferred upon the courts of justice. If, upon certain proceedings, it shall appear that the lands can not be partitioned to advantage, power is given to the courts to direct a sale, and to distribute the money.

The proceedings and judgments of the courts, in a petition for partition, must, like judicial proceedings in all other cases, bind both parties and privies, while they remained unreversed, however erroneously they may have been conducted.

In this case, the court of common pleas clearly were invested with jurisdiction over the subject, and between the parties. Whether

such interest descended to the heirs of Dabney, as entitled one of them to demand partition, was a judicial question, which that court were competent to decide. It naturally arose in the cause, and the decision of it concluded all concerned until reversed. The adjudication upon every other fact in the cause was of the same character.

It is urged, that by law the court are, in case of a sale being ordered, directed to require that the sale be made by the sheriff, and that, in this case, they appointed another person to make it. But this error could not have the consequence of taking away their jurisdiction, nor of rendering the sale void. They were authorized to direct a sale by one person, and they directed a sale by another. There is no just analogy between such a case, and one where the court adjudge that to be done which the nature of the action does not warrant, as adjudging that a defendant make a conveyance for land, or receive a beating in a personal action.

The judgment or decree, in the proceeding for partition, does not pretend to constitute Scott administrator for any other purpose than perfecting the objects of that decree. The sale made by him was approved by the court, and the deed made accordingly, although it does not specially refer to the proceedings in partition as its foundation. The defendants purchased under the order of sale, and received their deed in confirmation of that purchase and took possession under it. For the irregular proceedings of the court, or of the persons acting under its authorities, the defendants were not responsible. Whilst the decree remained in force, the plaintiff was divested of title, and the defendants invested with it. They committed no trespass by entering, for they entered under authority of law, and that they can not be made trespassers by relation, stands as strongly upon authority as it does upon the principles of good sense, common honesty and justice. It is for the possession thus obtained and continued, and abandoned with the destruction of the foundation upon which it stood, that this suit is brought. It is our opinion that it can not be sustained, and that the law of the case is with the defendants, for whom judgment must be given.

WINTHROP v. HUNTINGTON.

[3 OHIO, 327.]

COMPENSATION FOR IMPROVEMENTS and taxes in and about lands made by one who entered under color of title, and is ejected at law, can not be recovered in equity from the real owner.

BILL in equity for compensation for improvements. The opinion states the case.

Whittlesey and Newton, for the complainant.

Webb, contra.

By COURT. The complainant in this cause having been ejected from land claimed by him as owner, in consequence of a recovery against him at law, has filed this bill, seeking to be considered as trustee for the respondents in all that he did, to improve and preserve the lands in the character of absolute owner. The grounds upon which it is attempted to sustain this pretension are that inasmuch as the identification of the land, was the act of the complainant, and that identification is recognized by the respondents; as to this, they admit an agency. And as the improvements and payments of taxes were for the benefit of the respondents, equity may well consider these acts as performed in the character of agent, so as thus to be enabled to do justice to the parties.

We have carefully examined and considered the arguments advanced in support of these positions; but we find nothing in them to warrant us in giving to the acts of a party a character directly contrary to that in which those acts were performed. As a matter of fact it is indisputable that the complainant did not act as the agent of the respondents in any one of the matters in respect to which he claims compensation. He took possession of the land, not to preserve it for the respondents, but to occupy and improve it for himself. With this object, and for this purpose, he labored and paid money. And when the respondents asserted their right, he controverted it, and compelled them to establish it by a judicial proceeding. There is no allowable legal fiction by which the court can so change the character of a transaction as to convert an adverse pretension into an agency for him whose right is resisted.

It is true, the respondents have adopted the partition of the land as they have found it. But this conduct is no recognition of the agency of the complainant. It was competent for the owner to take the lands in the place they were assigned to him

by others who had claim whether the assignment was so made as to conclude him or not. This mere act of acquiescence can have no legal or equitable relation to the person on whose claim the assignment was made, and must be considered entirely independent of every one concerned.

The complainant acted in all that he did as a volunteer. It is impossible to give him any other character. And there is not only no case, there can be no principle, in which a mere volunteer can maintain a suit in law or equity for compensation, although there are many cases in which the party may be benefited by such interference, and in which an award of compensation would seem to be just. Nevertheless, were it once permitted that one man could volunteer his services to another, and coerce compensation, it would subvert the fundamental doctrines of contract, and open a door for incalculable mischiefs and litigations. The complainant's counsel are too sensible of this to assert that a mere volunteer can recover. Hence, they attempt to establish an agency in their client, and do not seem to perceive that to convert a volunteer into an agent, against the consent of the alleged employer, is but maintaining the principle abandoned in different terms differently applied.

The answer given by the defendant's counsel to the use made of the case of *Nowler, Douglass et al. v. Coit*, 13 Am. Dec. 640, is decisive upon its analogy to this case. Nothing is more common than for courts of equity, in decreeing a complainant the relief he seeks, to impose terms upon him which could not be asserted against him in an original bill, at the suit of the respondent. It is an ordinary principle of proceeding in equity, and results from the well known maxim, that he who asks equity shall do it, or be denied the equity he asks. In that case, the complainant asked the court to quiet his title against claimants under a sale similar to that through which the complainant claimed in this case. And the court proceeded to decree in his favor, upon the condition that he should repay the taxes advanced, and remunerate the party for his trouble in making the payment. And the decree is predicated upon the common principle, without an intimation that an original bill would have been sustained for that object. In this case the complainant reposed himself upon his adverse right until adjudged against him, and then, in direct contradiction of his former pretension, seeks to come before this court in a new character. Were we to sustain this bill, it could only be on a

principle that would entitle every person who took possession of lands belonging to others, supposing he had title, after he was ejected at law, to come into equity for aid and remuneration. This would certainly be an entire new branch of equitable jurisdiction to which we are not disposed to be the first to assent.

It is not the mere fact of a recovery in ejectment that excludes the defendant from relief here; but it is the principle upon which that relief is sought, between which, and permitting a mortgagor to redeem after the mortgagee has recovered at law, we can perceive no analogy.

There is no weight in the suggestion that the respondents slept over their rights. They were not barred at law, and in equity the rule is not varied. There is not even a suggestion that they practiced any fraud in permitting the complainant to proceed in his improvements and payment of taxes. Upon the ground of fraud only could a court of equity interfere where the statute of limitations does not apply at law, or by analogy, in this court.

The bill must be dismissed.

COMPENSATION FOR IMPROVEMENTS.—See *Jackson v. Loomis*, 15 Am. Dec. 347, and note; *Whitledge v. Wait*, 2 Id. 724.

COMPENSATION NOT ALLOWED for improvements made by one knowing the title to be in dispute: *Barlow v. Bell*, 10 Am. Dec. 731, and note.

TAYLOR v. BOYD.

[3 OHIO, 337.]

DECREE IN CHANCERY FOR THE CONVEYANCE of land, where the deed is not executed within the limited time, operates as a conveyance, subject, as between the parties, to a revesting of the title by a reversal of the decree.

REVERSAL OF A DECREE in chancery, under which a purchaser in good faith, and before service of citation on error, acquired title, does not divest the title of such purchaser.

AGREED case. John Boyd, the father of the defendant, Abraham Boyd, filed his bill in equity against James Taylor, the plaintiff's lessor, to obtain a conveyance of the premises in question, of which Taylor was then seised in fee. The court of chancery decreed that Taylor convey to Boyd, within a limited time, or that the decree operate as a conveyance. The specified time having expired without a deed being made, John Boyd

conveyed the premises to the defendant, having in the mean time taken possession under the decree. Before this conveyance was executed, Taylor had sued out a writ of error to reverse the decree, but the writ was not served until after the conveyance, and the defendant, Abraham Boyd, had no actual notice that such writ was being sued out. Upon the hearing of the writ of error, the decree of the court of chancery was reversed. The question presented for decision was whether, under the circumstances, the title of Abraham Boyd was affected by the reversal of the decree upon which it was founded.

Sill and Leonard, for the defendant.

Grimke, contra, urged that the pendency of a suit is notice to all the world, and that conveyances obtained during that period were void: Amb. 676; *Bishop of Winchester v. Gaine*, 11 Ves. 194; and that the pendency of a writ of error commenced from the time of its allowance: Bos. & P. 370; 1 T. R. 279; 2 East, 439; 1 Id. 662; 1 Mod. 28.

By COURT. Upon the state of facts in this case, James Boyd, by virtue of the decree in chancery in his favor, and under the provisions of the act regulating proceedings in chancery, obtained an absolute legal title to the lands in dispute. Whilst invested with this title, he entered into the possession. The title conferred by the decree was exactly that which Taylor, the defendant in chancery, had when the decree was rendered, and this title was as perfect in James Boyd, under the decree, as it was in Taylor before the decree was pronounced. Boyd's power to alien was as full and ample as any other owner's could be, subject, however, to be divested of the estate by the same power that invested it in him.

The foundation of this title was the decree in chancery that conferred it. So long as that decree remained in force, the title could not be impeached by Taylor or any person claiming under him, by conveyance made pending the suit in chancery, or after the decree. But what is the effect of the reversal of that decree?

It is urged that the decree having the same effect as a deed, being, in fact, an operative conveyance, its effect must be the same as if a deed had actually been made under the decree. In which case, it is maintained that a reversal of the decree would not divest the title. Without deciding what would be the effect of a deed in such a case, as between the parties to the suit themselves, we are fully prepared to say that as between the

parties, a reversal of the decree which confers the title, actually divests it, and reinvests it in the person where it vested before the decree was made.

When the decree of reversal is pronounced, the parties concerned are all before the court. The title vested by the decree is declared no longer to exist, and it would seem perfectly competent for the court at once to do justice between them. Why should the successful party be driven to a new bill to revest himself with the title? Surely, the great objects of justice are full as well attained by considering the reversal a revestment of title, and in that respect placing the parties as they stood before the original decree was pronounced. It is the most expeditious, the cheapest, and therefore, as we think, the most proper remedy. If the decree be reversed, and the bill dismissed, upon the opposite doctrine, the complainant thus turned out of court would nevertheless have obtained the whole object of his bill. And the defendant, after a final adjudication in his favor, would have to prosecute a new bill to obtain relief against the effects of a decree in a suit decided in his favor. This would be a strange anomaly in judicial proceedings, and one which ought not to be introduced without some strong necessity. Again, if on the reversal the court retain the cause, and on final hearing a second time, find the complainant entitled to a decree for the land, what form of decree is to be made? It cannot be that the defendant convey, for the doctrine insisted upon assumes that he has no title in him. It must be a decree confirming a title in the defendant, which he obtained under the reversed decree. Upon what principle of reason or enactment of legislation would this kind of decree stand?

But the most difficult and important point in this case is as to the effect the reversal is to have upon the rights of third persons, legitimately and innocently acquired. After the time limited in the decree itself had transpired, and the decree became an absolute title, the party thus invested with title and in possession of the land, sold and conveyed it to a third person, who stands before the court as an innocent purchaser for a valuable consideration, without notice. Can his rights be divested by a reversal of the decree upon which his title was originally founded? We are of opinion that they cannot be so divested.

When James Boyd conveyed to Abraham Boyd, he had a complete title, which it was competent for him to transmit by

conveyance in the usual mode. In making this conveyance, he divested himself of title, and invested it in Abraham Boyd, the defendant, who reported himself upon the solemn and final decree of a court of competent jurisdiction, then in full force, and of unquestionable validity. By this act of conveyance, made in good faith, James Boyd put an end to his power over the land. He could not resume his interest in it without the consent of his grantee, and no decree subsequently made in the suit, or in any new suit growing out of it, against James Boyd, could effect an interest which he had not in the subject. This consequence upon the premises here assumed seems to be conceded by the counsel for the plaintiff. But he argues that the conveyance can not be treated as one made in good faith, because, as he insists, it was made *pendente lite*. If this position be correct, the result contended for necessarily follows. For a conveyance of a subject in litigation, made pending the litigation, is universally treated as made in bad faith, and as universally held not to change the rights of any of the parties.

It is argued that the writ of error was sued out and bond given upon it before the making of the conveyance, and that consequently the suit was pending. On the other hand it is acknowledged that no citation had been served on the defendant in error, and there is no pretense that either the grantor or grantee knew that the writ of error was pending. We are of opinion that until the service of the citation, a writ of error is not to be considered as pending, so as to affect strangers as *lis pendens*. This, we think, is not only in accordance with good sense and fair dealing, but is also according to the best authority.

It is contended that a writ of error is not the continuance of the original suit, and, like a bill of revivor or an appeal, reinstates the suit, and refers all parties and things involved to its first commencement. We do not concede that such in all cases would be the consequence of a bill of revivor or of an appeal. But in this case we think the analogy does not hold. In the obvious nature and character of the proceeding, a writ of error is a new and original suit. Original process issues in it and must be served to bring the adverse party into court. The relative character of the parties is changed, new pleadings are made up, and a final judgment upon it, though it may operate upon the original cause, is nevertheless a termination of the new suit or process in error. We do not meddle with the nice distinctions by which a writ of error has been treated as a de-

fensive proceeding and a continuance of the cause in which the party alleged he had been prejudiced by an erroneous judgment. Though this proposition has been urged *arguendo*, in the most respectable tribunal of our country, we are not apprized of any case where it is made a ground of decision. We adhere to the doctrine that the writ of error is a new suit, and can only affect parties or strangers from the service of the citation.

The judgment must, therefore, be for the defendant.

McCoy v. CHILICOTHE.

[8 OHIO, 370.]

INJUNCTION AGAINST COLLECTING A TAX assessed in the ordinary way, and unaccompanied by any circumstances of peculiar injury, will not lie, although the act authorizing the tax be unconstitutional.

BILL to restrain the collection of a tax. The opinion states the case. Bill dismissed. Appeal.

Grimke, for the complainant, referred to *McCulloch v. Maryland*, 4 Wheat. 316; *Cohens v. Virginia*, 6 Id. 264; *Biddle v. Commonwealth*, 13 S. & R. 405; *Livingston v. Van Ingen*, 1 Paine C. C. 45.

Leonard, contra.

By COURT. The facts set out in the bill and answer, present the ordinary case of a proceeding to collect a tax assessed for the single purpose of revenue. The collection is to be made in the common manner, by the sale of the personal goods of the party. There is no allegation or pretense that to make the collection by distress would in any extraordinary manner prejudice the complainant. Neither is there any suggestion that the parties complained of are insufficient to respond in damages for the injury they are about to commit, should it be unauthorized by law. No circumstances distinguish the case from one of a common trespass, except that the act sought to be enjoined is about to be committed under color of law. In a mere matter of simple trespass, a court of equity has not yet interfered by an injunction. This is agreed upon both sides, and we are too well satisfied with the doctrine, as it is now settled, to make a precedent for disturbing it.

The proposition that chancery may interfere by injunction to prevent a multiplicity of suits, has no application that we can

perceive to this case. If the tax was levied by distress, one action at law would settle the right, and secure to the party his redress. If, notwithstanding, another tax was levied, it would be the subject of a single suit. The separate repetition of trespasses, laying a ground for separate suits between the same parties, is not that description of multiplicity of suits which induces equity to interfere. Where many parties and different rights are involved in the same transaction, all of which can not be legally adjusted without several suits, this state of things is sometimes held a sufficient ground for chancery to interfere. And we are by no means satisfied that what is said by way of argument, in the opinion in the case of *Osborn v. Bank U. S.*¹, warrants the conclusion that equity should take cognizance and jurisdiction between two individuals, where one apprehended a series of trespasses would be committed upon him, for each one of which, if perpetrated, the law gave him a full and adequate remedy.

The bill proceeds upon the hypothesis that the law authorizing the assessment of the tax in question, is unconstitutional, and therefore can confer no authority. But this does not make a case for chancery jurisdiction. Whatever may be the principal question in a cause, the attendant circumstances must be such as to give the court jurisdiction of the subject or between the parties, before it can be considered or decided. If the ground assumed in the bill is correct, then the collection of the tax is a trespass, and without the assistance of other facts than are here alleged, the remedy is at law, not in chancery. In the case of *Osborn v. Bank U. S.*², the jurisdiction was sustained evidently upon the ground that the trespass apprehended, if permitted, would operate the destruction of the bank. The undisguised object of the act to be enjoined was to destroy the franchise. For this, the court were of opinion, compensation in a verdict and judgment for damages would not be a full and adequate remedy, and therefore the preventive remedy of injunction became necessary. This case does not resemble that in any of its features, but in the single one that in both cases the collection of a tax was the subject in controversy. We think the jurisdiction can not be sustained upon safe and proper principles. The bill is dismissed on that ground, the other branch of the case not having been considered.

See *Burnet v. Cincinnati*, ante, 582.

1. 9 Wheat. 738.

2. 9 Wheat. 738.

LUDLOW v. JOHNSON.

[8 OHIO, 553.]

PREVIOUS TO 1795 THERE WAS NO LAW in the territory northwest of the Ohio, making real property assets in the hands of administrators for the payment of debts.

AN ORDER OF A COURT OF COMPETENT JURISDICTION can not be collaterally inquired into.

UNDER THE ACT OF 1803, "organizing the judicial courts," the courts of common pleas had jurisdiction to order the sale of real estate of a decedent.

THE LAW OF 1795 was not repealed by the act of 1804, defining the duties of executors, but was repealed by the act of February 22, 1805.

A NUNC PRO TUNC ENTRY of an order made when the court's authority had ceased does not render the order valid.

A NUNC PRO TUNC ORDER can not be founded upon mere parol proof of what was ordered to be done at a previous term.

CREDITOR'S INTEREST IN DECEDENT'S ESTATE, or that of the personal representative, is not of such a nature as to preclude the legislature from repealing the laws authorizing sales of the estate for the payment of debts.

EJECTMENT brought by the heirs of Israel Ludlow. The opinion states the case. Verdict for the plaintiffs, subject to the opinion of this court on a motion for a new trial.

N. Wright and Benham, for the motion.

Garrard and Hammond, contra.

By Court, HITCHCOCK, J. The question presented to the court for consideration in the present case, if not in themselves peculiarly difficult, are unpleasant to act upon, inasmuch as they involve the construction of some of the earliest legislation of the territorial and state authorities, and render it necessary to decide upon the validity of some of the acts of our courts in the infancy of the government.

To prepare laws which shall meet the exigencies of a people collected, not only from every state of the union, but also from almost every country in the civilized world, is no easy task. People coming together in this manner, and forming a new society, will entertain different views of policy, according to the prejudices which they may have imbibed in the different countries from whence they emigrated. When to this circumstance is added the consideration of the limited nature of that power which was delegated to the first legislative authority in the territory northwest of the river Ohio, it is not surprising that there should be some apparent inconsistency in their acts.

It is much to be regretted that the only evidence we have of the construction given to early statutes by the courts, at or about the times these statutes were adopted or passed, is derived from their records and from loose tradition. Unfortunately, as is too often the case in new communities, those records were loosely kept, and the tradition, with respect to their practice, is so contradictory as to be entitled to but little reliance. Contemporaneous construction is of vast importance in deciding questions arising under statutes; but we can not learn that the principal point now in controversy was ever before submitted to any court in the territory or state for determination.

The title of the lessors of the plaintiff to the premises in litigation is perfect and must prevail, unless that title has been destroyed or has passed from them in consequence of the proceedings attempted to be proved by the defendants.

The defendants claim title under purchasers at a sale made by the administrators of Israel Ludlow, in pursuance of an order of the court of common pleas of Hamilton county acting as a court of probate, or orphans' court, entered at the August term, 1805. The validity of this title must depend principally, and perhaps entirely, upon the solution of the question, whether the court of common pleas had power or jurisdiction to make this order. For which purpose it is necessary to examine carefully the pre-existing and various statutes on the subject of the settlement of the estates of deceased persons, as well as many other statutes which may bear upon the question and assist the court in coming to a correct conclusion.

It has been strongly argued that, from the first existence of a civilized government in the territory which now constitutes the state of Ohio, lands and tenements have been assets in the hands of administrators for the payment of debts. The argument to sustain this position is managed with much ingenuity. The principle, however, is unknown to the common law. By that law administrators have no concern with or control over real estate, and in those states of the union where they possess this power it is in consequence of statutory regulation. So far as they have ever had any control over real estate, so far as it has been, in their hands, assets for the payment of debts, in this state either under the territorial or state government, it is in consequence of positive enactment. Let us, then, ascertain when the principle was first introduced as a part of our system of law.

It is not found in the ordinance of congress "for the govern-

ment of the territory of the United States northwest of the river Ohio." This ordinance was passed on the thirteenth of July, 1787, and was ever considered as the fundamental law of the territory. It provides for the appointment of a governor and three judges, to whom legislative power is delegated until the organization of the general assembly, which is to take place "so soon as there shall be five thousand free male inhabitants of full age within the district." The general assembly was organized in 1799, after which the legislative power of the governor and judges ceased. The power of the governor and judges, while they possessed it, was very much restricted, as appears by the following quotation from the ordinance: "The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original states, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to congress from time to time, which laws shall be enforced in the district until the organization of the general assembly therein, unless disapproved of by congress, but afterward the legislature shall have authority to alter them as they think fit."

Soon after the passage of this ordinance, the territorial government went into operation, and so early as 1788 the governor and judges commenced their legislative duties. It will be readily conceived that from the restrictions under which they labored, it must have been extremely difficult to establish a consistent code suited to the wants and necessities of the people. In consequence of this difficulty, they did, in some few instances, enact and publish original statutes to complete what they deemed to be a proper system of laws. Those original enactments were considered to be doubtful authority.

Although the ordinance provides for the manner in which estates of intestates shall descend and be distributed, in which wills shall be made and executed, in which lands and tenements shall be conveyed, yet it contains no provision on the subject of the settlement of estates of deceased persons. This is left to be provided for by future legislation.

On the thirtieth of August, 1788, the law "establishing a court of probate" was published. The power and jurisdiction of the court are defined. Nothing, however, is said with respect to the real estate of a deceased person, nor had that court, by its organizing law, any jurisdiction over this description of property; and in fact, after a careful examination of all the statutes of the territory, we have been unable to find any one

previous to 1795 authorizing an administrator to sell real estate, or making such estate assets in his hands for the payment of debts. Counsel for the defendants urge the court to infer its existence from certain expressions used in a statute passed or published August 1, 1792, entitled "an act empowering the judges of probate to appoint guardians to minors and others." In the third section of this act power is given to the guardians of "idiots, lunatics, *non compos* or distracted persons," to pay the debts of such persons "out of their personal estate, or in case that be insufficient, then out of the real estate in such way and manner as executors or administrators may, or shall, by law be authorized to discharge the debts of deceased persons, when the personal estate of such deceased person shall be found insufficient." This is said to be an express recognition of a law, although it is admitted that no such law can be found.

That there may be and are cases in which a statute which can neither be found in the statute book nor of record in the proper office, should be presumed or inferred, is not controverted. But it can only be done under peculiar circumstances. Where from great lapse of time, or from extraordinary accidents, there is strong reason to believe that a statute may have been lost; and where, from a uniform and long-continued practice, it may reasonably be supposed that such statute once existed, it may be proper to infer it. In England, where government has existed for centuries, there can be no doubt that many statutes have been lost by time and accident, the principles of which are still adhered to, and have been incorporated with and constitute a part of the common law. Indeed, some writers go so far as to insist, that the whole system of the common law is built upon such statutes. But what peculiar circumstances are there to justify the court in making the inference insisted upon by counsel in the present case? The lapse of time is not so great as to furnish a reasonable presumption that the statute may have been lost; for it is now but about forty years since the first organization of the government, nor is there any pretense that previous to the year 1795 the practice prevailed of authorizing administrators to sell real estate. So far as the practice prevailed subsequent to that period, it was justified by the law of that year. It must be recollected that under both the territorial and state governments, it has been the uniform intention to print every statute of a general nature, and this intention has been carried into execution, unless it be with the exception of the law which the court are called upon to infer. It is strange,

indeed, that a law containing such important principles should be the only one that has never appeared in print. Under these circumstances, to infer a law, as is proposed, would seem to me to savor too much of giving a forced construction to sustain a favorite and preconceived opinion, or to enable us to get over a hard case.

It is said that unless such inference is made, the legislative authority which published the law of 1792, must stand chargeable with absurdity. The conclusion by no means follows. Full effect may be given to that act without resorting to presumption or inference. Guardians are authorized to sell real estate in the same manner that "administrators may or shall by law be enabled," etc. The words may or shall, as here used, do not necessarily import that the governor and judges supposed that administrators then had power by law to sell real estate. They more properly refer to future legislation, to provisions which might subsequently be made on this subject. Had the intention been to refer to an existing law, the word *are* would more naturally have been used. I am aware that courts in construing statutes never ought to criticise upon words or the grammatical construction of sentences. The intention of the legislature is the great point to be ascertained, and this intention, when once discovered, must be followed, whatever may have been the form of words or phrases in which it is expressed. But when you can, by giving to words or sentences their ordinary import, carry into effect a statute, they ought to receive this interpretation, especially when by extending or varying this import, the enacting power will appear to have acted absurdly. Had there been a law in the statute book authorizing administrators to sell real estate, I should at once have said, it was the intention of the governor and judge to refer to that law, together with such others as might subsequently be passed on the same subject. But I cannot, merely from the use of the words before cited, infer the existence of such a law, and then say these words refer to it. It is more reasonable, more consistent with sound construction, to say that reference is had to future legislation.

From an examination of our statutes, it is apparent that both the territorial and state legislatures have been in the habit, when referring to the provisions of an existing law, as the rule according to which certain things which are, by the referring statute, required to be done, shall be done and performed by making use of the words *is* or *are*, most generally, if not universally. Thus, in the act of 1805, for the recovery of money se-

cured by a mortgage, the mortgaged premises are to be taken in execution, and disposed of in the same manner, and under the same regulations, that lands or tenements "are, or may be by law, disposed of for the satisfaction of executions." The same mode of expression is made use of in a law on the same subject, passed January 2, 1810. So, in the act of January 15, 1805, for the appointment of guardians to "lunatics and others," an act, in part, upon the same subject with the one now under consideration, guardians are, by the second section, authorized, in case of a deficiency of personal property, to pay debts "out of the real estate, in such manner as executors or administrators are, by law, enabled to discharge the debts of deceased persons."

It is unnecessary, however, to go further in this examination. The existence of the law in contemplation can not be inferred, and the court are clear in the opinion that previous to 1795, there was no law in the territory making real property assets in the hands of administrators for the payment of debts.

In that year, the orphans' court was created, and on the sixteenth day of June of the same year, a law was published, adopted from the Pennsylvania code, which took effect on the first day of August, entitled, "a law for the settlement of intestates' estates." The seventh section of this law enacts: "If any person or persons shall die intestate, being owners of lands or tenements within this territory, at the time of their death, and leave lawful issue to survive them, but not a sufficient personal estate to pay their just debts and maintain their children, in such case it shall be lawful for the administrator or administrators of such deceased person, to sell and convey such part or parts of the said lands or tenements, for defraying their just debts, maintenance of their children, and for putting them apprentices, and teaching them to read and write, and for the improvement of the residue of the estate, if any there be, to their advantage, as the orphans' court of the county where such estate lies, shall think fit to allow, order or direct, from time to time." In the subsequent section of this act, regulations are made with respect to the manner in which real estate is to be sold. It is to be done upon proof made to the orphans' court, that there is a deficiency of personal property, and in pursuance of an order of that court, after due and proper notice given. No other law containing in any respect similar provisions, was passed until 1808. The act of January, 1802, for the distribution of insolvent estates, directs that the property, "both real and personal," of the insolvent, shall be sold according to law;

plainly referring to the law of 1795, which was the only one then in force on the subject.

Whether the law of 1795, which clearly gives authority to administrators, under certain circumstances, to dispose of the real estate of intestates, was repealed before 1808, remains to be hereafter considered.

On the trial of this cause in the circuit, the defendants offered in evidence the orders of May, 1804, and August, 1805, made by the court of common pleas of Hamilton county, in connection with the testimony of two of the judges of that court, relative to the manner in which the latter order was made. This court overruled the evidence, and whether it was proper so to do, depends upon the solution of the question, whether the court of common pleas had power to make the latter order; in other words, whether that court had jurisdiction of the subject-matter.

If the court of common pleas, acting as a court of probate or orphans' court, had jurisdiction, an end is put to the question; the evidence ought to have been received. We can not inquire collaterally whether that jurisdiction was properly exercised. The order may have been unadvisedly or erroneously made, but the purchaser has innocently acquired rights of which he can not be divested, so long as it remains unreversed. Under our present existing laws, real estate can not be sold for the payment of the debts of a deceased person, until it is ascertained that there will be a failure of personal assets. The court of common pleas must be satisfied of such failure, before it can, with propriety, order a sale. Yet, when a sale has been made, and its validity is questioned, this court will go no further back than to inquire whether it was ordered by competent authority. So far as the interests of the purchaser are concerned, we consider such orders equally available as judgments. The former can be no more impeached collaterally, because there was an abundance of personal estate to have satisfied all debts, than the latter can by showing that the evidence under which they were recovered was insufficient.

We are aware that by adhering to this principle a great injustice may many times be done to heirs, for it is too often the case that those who attempt the settlement of estates are regardless of all other interests than their own. The consequences to be apprehended are not equally dangerous as those which would follow a different course of decision. While lands are sold for the payment of the debts of deceased persons,

every inducement should be held forth to encourage purchasers to give the full value of what they buy. And nothing can have a greater tendency to produce this effect than to afford them, when they have purchased, a reasonable protection. There is no good reason why those who purchase from an administrator should not be viewed with the same favorable eye with those who purchase from sheriffs. In either case it is proper that the order or judgment should remain final and conclusive upon all parties concerned until set aside, annulled, or reversed.

An attempt has been made to infer the power of the court of common pleas to make the order in question from the extent of their jurisdiction in other matters. That court possesses very general common law and chancery jurisdiction, and many other matters are confided to its care. But when acting upon those matters the court must act strictly according to the powers conferred. When acting upon questions relative to roads and highways, for instance, that court is as much restricted by the statute as the county commissioners when acting on the same subject. When acting as a court of probate or orphans' court, the same rule must be observed in ascertaining the extent of its powers as if it possessed no other jurisdiction whatever; and while thus acting, it is a court of limited jurisdiction. If this principle seem to be departed from, in any measure, in giving the same effect to orders of sale which are given to judgments, we can only say that such course is justified by the policy of the law and the necessity of the case.

Had the court of common pleas power or jurisdiction to make the order of August, 1805? If it possessed this power it was in virtue of the act of 1795: "for the settlement of intestate estates;" for it is clear that this was the only law previous to 1808, under or by virtue of which an executor or administrator could be authorized to sell real estate. This brings us to the consideration of the question whether this was in force at the time the order was made.

On the part of the plaintiff, it is contended that this law is virtually repealed by the judiciary act of 1803. Or, rather, that it ceased to have any effect, inasmuch as the powers confided by its provisions to the orphans' court, are not expressly transferred or granted to any other court.

The first section of the third article of the constitution of the state of Ohio provides that "the judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, courts of common pleas for each county, in

justices of the peace, and in such other courts as the legislature shall, from time to time, establish." In the subsequent section of the same third article, provision is made that the several courts shall have jurisdiction in such cases as may be specified by law. Hence, it is manifest that although the constitution provides that there shall be a supreme court, and courts of common pleas, yet it was not the intention of the framers of that instrument to organize those courts or confer upon them any specific jurisdiction.

They are merely made capable of receiving jurisdiction. Their organization, the extent of their power, the nature of their duties, and the manner in which this power and those duties are to be exercised and performed, are all left to be provided for by future legislation. The fifth section of the same article provides, however, that the courts of common pleas in the several counties "should have jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians, and such other cases as shall be prescribed by law." By a fair construction of this clause, any law which shall confer probate and testamentary jurisdiction on any other court than the court of common pleas, would be in contravention of the constitution. Still, the manner of exercising this jurisdiction must be declared by statute.

That no inconvenience might be experienced in changing from a territorial to a state government, the schedule to the constitution provides, among other things, that the laws of the territory then in force, and not inconsistent with that instrument, with but one exception, shall continue in force and have full effect until repealed by the legislature.

By the act of the fifteenth of April, 1803, "organizing the judicial courts," the court of probate and orphans' courts are expressly "abolished." The seventh section of this act relates to the jurisdiction of the courts of common pleas, and enacts that "they shall have power to examine and take the proofs of wills, to grant administration on intestates' estates, and to hear and determine all causes, suits and controversies of probate and testamentary nature, to appoint guardians for minors, idiots, and lunatics, and to call such guardians to an account."

The twenty-sixth section enacts, "that the supreme court and courts of common pleas, agreeable to their respective jurisdictions, shall take cognizance of all judgments, causes, and matters whatsoever, whether civil or criminal, that are now depending, undetermined or unsatisfied, either in the general

court, courts of common pleas, courts of probate, or general quarter sessions of the peace; and the said supreme court and courts of common pleas, respectively, are hereby authorized and required to hear and decide upon the said matters, as fully and completely as if the causes had originated in the said supreme court or courts of common pleas."

From these provisions, taken in connection with the constitution, it is clear that the legislature intended to transfer to the court of common pleas the business of probate or testamentary nature then pending in the orphans' court or courts of probate, to be completed in the same manner and under the same regulations it would have been completed in those courts had they continued without any change of jurisdiction.

But in the settlement of estates of persons who should die, what law was to govern? By what rule would the court be regulated in the appointment of administrators, in requiring bonds, and in the discharge of other duties incumbent on them, as a court having sole jurisdiction over probate and testamentary matters? By what rule would administrators be guided in the settlement of estates? Unquestionably by the law of 1795. This was continued by the constitution, and was the only one, or the principal one, in force on the subject. Not a part only, but the whole law remained obligatory. It is true, the courts of common pleas are not expressly authorized to direct administrators to sell real estate, but as the law authorizing such sale was still in force, and as this was the only court having charge of the settlement of estates, it is proper to give the statutes of 1803 such a construction as to confer upon it the same powers as were possessed by the orphans' court under the law of 1795. Such was the construction given to the law at the time, so far as we can gather anything from contemporaneous practice, and we are not disposed to question the propriety of that construction.

It is further insisted that the law of 1795 was repealed by the act of February 18, 1804, "defining the duties of executors and administrators on wills and intestate estates." The law in question is not expressly repealed by the last cited act. If repealed at all, it is done by implication. When the provisions of two statutes are so far inconsistent with each other that both can not be enforced, the latter must prevail. But if by any fair course of reasoning the two can be reconciled, both shall stand. When the legislature intend to repeal a statute, we may as a general rule expect them to do it in express terms, or by the use of words which are equivalent to an express repeal. No court will, if

it can be consistently avoided, determine that a statute is repealed by implication. The act of 1804 repeals expressly "all laws and parts of laws contrary to the provisions of this act." What parts of the law in question are "contrary to the provisions of this act"? This act relates to the personalties alone of the deceased individual whose estate is to be settled. It provides the manner in which this description of property shall be disposed of. So far it repeals the law in question. Nothing is said, however, concerning lands and tenements. Full effect may be given to it in all its parts, and still those parts of the law of 1795 which relate to real estate remain in force. There is nothing inconsistent, nothing contradictory. The two statutes may stand together, making a consistent system, constituting real as well as personal property, assets in the hands of administrators. From these considerations we are not prepared to say that the law in question was repealed by the act of February 18, 1804.

The next point made by the plaintiff's counsel is, that the law in question was repealed, if not before, at the first session of the third general assembly of the state, or the session of 1804-5. 1. By "an act defining the duties of administrators on wills and intestates' estates, and providing for the appointment of guardians," passed February 1, 1805, or if not, then, 2. By "an act repealing certain laws," passed February 22d of the same year. Both these acts, like most of the other laws of the same session, took effect on the first day of June, next after their passage.

It must be recollected that at this session the legislature took upon themselves the task of re-enacting and revising all the laws of a general nature, so as to bring together those in force and form a system of statutes suitable to the exigencies of the state. It may be well, too, further to bear in mind that the legislation of the state shows that when the legislature have attempted a revision of the laws, one great object has been to collect and embody in one statute all those laws and parts of laws on one subject which had been previously enacted, and which it was intended to continue in force.

The act of 1805, "defining the duties of administrators," etc., points out the duties of such persons, authorizes the sale of personal property, unless otherwise directed by administrators and executors, specifies the manner in which sale shall be made, requires administrators to account, and provides for the distribution of such goods and chattels as shall remain after

the payment of debts. Every step which shall be taken by an administrator, from the time of his appointment until he shall have discharged his duty, by paying over and delivering to the creditors and heirs all the property which shall have come to his hands, or possession in fact, until, so far as he is concerned, the estate is entirely settled, is completely settled, is distinctly marked out. And yet not one word is said about real estate. This description of property the administrator is neither authorized to sell nor otherwise to interfere with.

The eleventh section of this act, after repealing certain laws by their title, repeals "all laws on the same subject." The act of 1804, already considered, repeals all laws contrary to its provisions; this and all laws on the same subject. One of the primary objects which the legislature had in view in the passage of this act was to provide for the "settlement of intestate estates." It would seem impossible, then, to resist the conviction that inasmuch as the law of 1805 repeals all laws on the subject of that law, it repeals the law of 1795, which is upon the same subject. The words used, taken in connection with the subject-matter, would seem to be equivalent to a repeal of that law by its title. The view, however, which the court have taken of the repealing law of the twenty-second of February, 1805, supersedes the necessity of a definite decision upon this point.

The first section of the last named statute enacts "that all laws adopted or passed by the governor and judges prior to the first of September, in the year of our Lord one thousand seven hundred and ninety-nine, and now in force in this state, be, and the same are hereby repealed." The same section contains a proviso, "that nothing in this act contained shall be construed so as to affect in any manner any suit or prosecution now depending and undetermined, but the same shall be carried on to final judgment and execution, agreeable to the provisions of any of the said laws under which the suit or prosecution may have been commenced, and the practice of the courts.

The policy of the general repealing law has been questioned by the counsel for defendants, and the legislature treated with some considerable degree of severity for its enactment. Whether the law be politic or impolitic, whether its provisions be strictly equitable or otherwise, are considerations which must not operate with the court in determining its effect. It is our duty to declare not to make the law. To do this correctly, the ordinary rules of construction must be adopted, and the mean-

ing of words, sentences, and phrases must not be distorted in order to sustain a favorite opinion. The great object in the construction of all statutes is to ascertain the intention of the enacting power, and the rules to be observed for this purpose are simple and too well known to need repetition. This intention having been ascertained, the court which refuses to carry it into effect must be regardless of its duty.

A careful examination of the legislative acts of the general assembly during the session of 1804-5, shows most clearly that it was a leading motive or intention of that body to abrogate or repeal all the laws passed or adopted by the governor and judges. Almost every one, and perhaps every one, with the exception of the one in question, is repealed specifically. Yet, as if fearful some one might have escaped their notice, they pass the general repealing law now under consideration. Why this feeling should have prevailed, why they should have been so solicitous to effect this object, it is not necessary for us to inquire. If the intention is manifest, that is all we should be anxious to know upon the subject.

“All laws adopted or passed by the governor and judges prior to the first day of September, in the year of our Lord one thousand seven hundred and ninety-nine, and now in force in the state, be, and the same are hereby repealed.” These words are clear, precise, and specific. No man of ordinary capacity could mistake their meaning. There is nothing uncertain, nothing ambiguous, nothing doubtful. There is in fact no room left for construction. The law in question was adopted by the governor and judges prior to the first day of September, 1799. The intention to repeal it is as clearly manifest as if it had been named by its title. There is no way to escape this conclusion, except by adopting a train of reasoning which would go to convince the great body of the community that there is even more uncertainty in the law than what is now generally apprehended. The counsel for the defendant, however, labor with much ingenuity and seeming confidence to convince the court that although the law in question may have been included by the general terms of the repealing law, yet it was not the intention of the legislature to repeal it, but that it should still remain obligatory and in force. The great burden of the argument, however, would seem to be calculated to produce conviction that the repeal ought not to have taken place, rather than that it did not take place.

In the first place, it is urged that the general practice of the

courts in the state, immediately and constantly after this repealing law took effect, shows the understanding to have been that the law in question was still in force. We without hesitation recognize the principle that the general practice of courts goes far, and is very conclusive evidence, to establish the contemporaneous construction of statutes, and such contemporaneous construction we should be disposed to adhere to, although it might be difficult after a lapse of years to ascertain why it had been given. But the fact that an order substantially like the one of August, 1805, was made in one or two cases, or even in two or three different counties, is not sufficient to establish a general practice. Such general practice is denied, and there is not that evidence that it ever prevailed, which would justify the court in varying on this account from that which appears to be a proper construction of the law.

Had there been a judicial construction given to the statute soon after it was enacted, and had that construction been acquiesced in and adhered to, it would have been conclusive upon the subject. We can not find, however, that any such construction was given, and it is believed that this is the first instance in which the question has been presented to any court in the state, in such shape as to require a decision. So far as we can ascertain anything about judicial construction heretofore given, it is to be derived from the order in question; and from an examination of that order, in connection with the circumstances disclosed in the case, I have no doubt that the court of common pleas acted under the impression that the law of 1795 was repealed. That court did not at the time suppose it possessed the power to authorize administrators to sell real estate. It will be found extremely difficult under any other impression to account for their proceedings. After the May term, in which it is pretended the order was in fact made, no proceedings had been had, no sale had been effected, in truth, no attempt had been made to sell. The estate remained as it was before that term. If the law had remained unchanged, an order of sale, to take effect from August, would be equally available and equally advantageous to all concerned, as one to take effect from May. Had there been a sale in virtue of a parol or pretended order of May, had an innocent purchaser acquired rights, this would have been a plausible and perhaps sufficient reason why the entry of August should be directed to be considered as of the May term previous. This is said upon the supposition that the jurisdiction had continued the same. But no single step

had been taken to carry that order into execution. Under these circumstances I can arrive at no other conclusion than that the court acted under the impression that the law in question was repealed, and that they possessed no further power over the real estate of a deceased person. Entertaining this opinion, but believing that justice required the appropriation of real estate for the payment of debts, and perhaps feeling that there had been on their part some little neglect of duty, the direction was given to have the "entry considered as of May term," no doubt at the time being entertained of the propriety of the proceeding.

Let it not be supposed that any corrupt or improper motives are imputed to the members of that court. Nothing could be further from my intention. The testimony of one of them shows what had been done at the previous term, and the motives by which they were actuated in this proceeding. This testimony, although it is conclusive to remove any unfavorable impression which might by possibility have been entertained with respect to the integrity of that court in this proceeding, was not competent for the purposes for which it was introduced, and was properly overruled. That court is a court of record, and its orders, judgments, and decrees must be proved by the record itself.

"An act for the distribution of insolvent estates," passed February 1, 1805, is cited to show that it was not the intention of the legislature, by their general repealing law, to repeal the law in question. This, like the repealing act, took effect on the first day of June next after its passage. Upon an examination of its contents it must appear somewhat doubtful whether its provisions extended merely to personal estate, or both real and personal. The legislature seem to have contemplated the distribution of the whole estate among creditors in proportion to their several demands. The widow's right of dower is secured, and, in strict legal parlance, this interest grows out of, or is attached to, real estate. This circumstance strengthens the opinion that real property is to be distributed. Still, the law does not expressly mention real estate. It contains no provision describing the manner in which it should be disposed of; whether it shall be done by the "trustees" or the "administrators," whether by order of court or otherwise. Nor is reference made to any other law as a guide in this respect. When we examine the law of January 31, 1802, for the distribution of insolvent estates, which is repealed by the act now under consid-

eration, and compare that law with this, it must be manifest that there is great uncertainty with respect to the intention of the legislature. The act of 1802 authorizes and directs that the judges of probate, whenever the estate of any deceased person shall be insolvent, and after certain enumerated claims are satisfied, "shall order the residue of the estate, both real and personal, the real being sold according to law, to be paid and distributed to and among the creditors," according to the terms of and under the directions contained in this law, "in proportion to the sums unto them respectively due and owing, saving unto the widow, if any there be, her right of dower in the lands and tenements." The same law provides that the orphans' court may, upon the prayer of a majority of the creditors, order the sale of such lands and real estate as may be set apart to the widow for her dower, subject to her interest therein; and if such lands should not be disposed of in this manner, then, after the death of the widow, they are to be sold, and the avails distributed among the creditors, "in proportion to their several demands which shall have been proved and allowed," according to the provisions of the act.

If it was the intention of the legislature, by the law of 1805, now under consideration, to subject the real as well as personal estate of the insolvent to sale, by the administrator or by the ' trustees,' for the payment of his debts, it is strange that they should not have made an express provision for it. The law which was then before them and which they were about to repeal was, as we have just seen, full and explicit. Still, in this act they are cautious about saying anything in direct terms with respect to the real estate, and it is only by implication that we can be induced to suppose that they had it in contemplation. After mature deliberation it would seem to me that a careful comparison of the statute now under consideration with the one which it repeals, instead of having the effect which is contended for by the defendants, would have a tendency to lead the mind to a contrary conclusion. It would rather furnish additional evidence of an intention on the part of the legislature, in the session of 1804-1805, to withdraw from executors or administrators the power of interfering with real estate, and to leave the law in this respect as it was previous to the adoption of the statute of 1795.

The court do not authorize me, however, to say that by the law now under consideration it was not the intention to subject the real estate of a deceased insolvent to the payment of his

debts, through the instrumentality of his administrators. But if such was the intention, the act was very imperfect and defective. These imperfections and defects could not be supplied by the court of common pleas, acting as a court of probate, nor will they justify this court in refusing to give effect to another statute, with respect to the meaning of which there does not appear to be any doubt.

The counsel for the defendants further contend that it is manifest, from the act of 1805, entitled, "an act for the appointment of guardians to lunatics and others," that it could not have been intended to repeal the law in question. The second section of this statute contains a provision that in failure of personal estate the guardian of an "idiot, *non compos*, lunatic, or insane person," shall be authorized to discharge the debts of such person "out of the real estate, in such manner as executors or administrators are by law enabled to discharge the debts of deceased persons, when the personal property is found insufficient." Here the principle seems to be recognized that at the time of the passage of this act there was a law in force, authorizing administrators to dispose of real estate; and such appears to have been the fact. The law defining the duties of administrators, etc., already considered, was passed on the first, and the general repealing law on the second, day of February, subsequent to the date of the statute now under consideration. The inferences, however, which are drawn from the above cited expressions used in this act, can not be acquiesced in by the court.

When in one statute a reference is made to an existing law, in prescribing the rule or manner in which a particular thing shall be done, or for the purpose of ascertaining powers with which persons named in the referring statute shall be clothed, the effect generally is not to revive or continue in force the statute referred to for the purposes for which it was originally enacted, but merely for the purpose of carrying into execution the statute in which the reference is made. For this purpose, the law referred to is in effect incorporated with, and becomes a part of the one in which the reference is made; and so long as that statute continues, will remain a part of it, although the one referred to should be repealed, such repeal would no more affect the referring statute than a repeal of this latter would the one to which reference is made. Such references are common in our legislation, and a slight examination will show that this is the effect intended to be produced. We will take, for instance,

the several laws for the recovery of money secured by mortgage.

In the sixth section of "a law subjecting real estate to execution for debt," adopted from the Pennsylvania Code on the fifteenth of August, 1795, provision is made for the recovery of a debt thus secured. After judgment a *levari facias* is to issue, upon which the mortgaged premises are to be seised and sold. In executing the writ the officer is to be governed by the same rules as in executing similar writs in other cases.

On the twenty-sixth of January, 1802, the subject was before the territorial legislature and an act passed "providing for the recovery of money secured by mortgage." This act, like the sixth section of the law "subjecting real estate to execution for debt," directs that commencement of proceedings on a mortgage may be by *scire facias*, and, after judgment is recovered, execution is to be issued and levied on the mortgaged premises. In the sale of these lands, the officer is to be governed by the same rules in giving notice as "is or may be required by law, for the sale of other real estate taken in execution."

Here let it be remembered, that although the same legislature on the nineteenth of January, the day before this mortgage law was passed, passed "an act regulating executions," by which the before cited law, "subjecting real estate to execution," was repealed, in neither of these laws was there any provision for the appraisement of lands. They were to be sold for what they would bring. But the act of February 16, 1805, "regulating judgments and executions," makes an entire and important change in this respect. Under this law, lands, although subject to execution, must be appraised, and can not be sold for less than two thirds of their appraised value. Thus, the first law on the subject passed by the state authority, contains this new principle, a principle which has been found by experience from that day to this to be highly beneficial, and which, I trust, will not now be expunged from our statute book, whatever other changes may take place. But to return to the mortgage laws.

On the twelfth of February, 1805, the state legislature passed an act bearing a similar title with the one last referred to on this subject, repealing that statute, as this was itself repealed by another act on the same subject, on the second of January, 1810, which act still continues in force. Both these last acts, in directing the mode of proceeding after the recovery of judgment, have this provision "on which a writ of *levari facias* may issue, by virtue whereof the mortgaged premises shall be taken in

execution, and disposed of in the same manner, and under the same regulations, that lands and tenements are or may be by law disposed of for the satisfaction of judgments."

The repealing part of the law of 1805 has no saving clause as to mortgages executed prior to the time of its taking effect, but the money secured by them is to be recovered in the same manner with that secured by mortgages executed subsequent to that time. To remedy this defect, the legislature on the twentieth of January, 1807, passed a supplemental act, providing, "that all money secured by mortgage prior to the taking effect of the law now in force, entitled an act for the 'recovery of money secured by mortgage' be, and the same is hereby made recoverable, in the same manner that money secured by mortgages was made recoverable by the laws in force at the time such mortgage was executed, any law, usages, or custom to the contrary notwithstanding." A similar provision is contained in the general mortgage law of 1810.

It has been already shown that money thus secured previous to 1805, was to be recovered, partially at least, according to the execution laws of 1795 and 1802, having reference to the time when the mortgage was executed. Those execution laws were repealed in 1805, by the judgment and execution law of that year. Now by the passage of this supplemental act those laws are revived; but to a short extent. Not as the general law of the land. Not as a rule to govern in all cases where money shall be made upon execution. But for the purpose merely of enabling the mortgagor to recover his money according to the law in force at the time he took his security. Adopt the principle contended for by the defendants and it would follow that those laws are still in force, and that lands may still be sold on execution, without appraisement, contrary to the settled policy of the state for more than twenty-five years. In like manner the law in question may have been continued in force by the act of the fifteenth of January, 1805, so far as to enable the guardian of an "idiot, *non compos*, lunatic, or insane person," to sell real estate for the payment of debts of such persons, but not a law for the "settlement of intestate estates," or, in other words, the law in question was incorporated with, and became a part of this latter act.

It is not denied that a law may be revived or continued in force merely by being referred to in another statute so as to require that the same effect should be given to it as was intended by its original enactment. But this indirect mode of

legislation is not often resorted to, nor ought legislative acts to receive such a construction as will give them this effect, unless such appears clearly to have been the intention of the legislature. In the present case a contrary intention seems to have governed that body, and it is impossible for the court to come to any other conclusion than that the law in question was repealed from and after the first day of June, 1805.

Another point made by the counsel for the defendants is, that admitting the law in question to have been repealed, the order of August term must be effectual inasmuch as the entry is directed to be "considered as of May term, 1805."

The power of courts to adopt the practice of entering orders, judgments, and decrees, *nunc pro tunc*, is recognized. But had there been any the least doubt on the subject, the numerous authorities cited by counsel would have removed it. It is many times necessary for the attainment of justice, and, when properly exercised, should be favored. Although the power of a court to adopt this practice is admitted, there is more difficulty in determining the effect which shall be given to such order, judgment, or decree. There can be no doubt that such an entry may operate so as to save proceedings which have been had before it is made. For instance, a judgment is actually made at one term, but through mistake or negligence is not entered of record. Subsequent to the term, the plaintiff, under the impression that the business had all been correctly transacted, prays out execution. The property of the judgment-debtor is levied upon and sold to a *bona fide* purchaser, who parts with his money in good faith. In such case the court may with propriety enter a judgment to be considered of the term in which it was actually rendered and should have been entered. Such proceeding should be for the furtherance of justice. It would do no injury to the parties concerned, and would secure the rights of an innocent purchaser. So, in the present case, had there been a sale in pursuance of the pretended order of May term, and had the jurisdiction remained the same, the court might with propriety have made the *nunc pro tunc* order of August. But there has been no sale nor attempt to sell. Under such circumstances, how is such an order and judgment to be considered with respect to subsequent proceedings? Shall it operate as an order or judgment of the term when actually entered, or of a preceding term? Take the case of the term before supposed. It is actually entered at the August term, although to be considered as of May, and no

execution issues until after August. Is this to have the same effect to all intents as a judgment of May term? If so, it operates as a lien upon the lands of the debtor from the first day of that term, and an innocent purchaser who had bought between May and August, after having made an examination to ascertain whether there was or was not any lien upon the lands, would be defeated of his purchase. Will it be said that such purchase would to all intents operate as a judgment of May? Judgments operate as liens upon the lands of the debtor from the first day of the term in which entered, and no person buying subsequent to that period would be protected under the plea that he was an innocent purchaser without notice.

Again, if such judgment was to have the same effect to all intents, as if actually entered in May, the party against whom it was rendered would be deprived of his right of appeal. This right is secured by statute, the party appellant giving bonds, within thirty days after the term, in double the amount of the judgment. The bond could not be given before August, for there would be no judgment of record, no means of ascertaining the amount. And if given after August, it would be too late, more than thirty days after the May term of which the judgment is to be considered having expired. This consideration induced the court, in the case of *Gosforth's Administrators v. Hezekiah Flint*, to decide that so far as respects the right of appeal, at least a *nunc pro tunc* judgment must be considered as a judgment of the term when actually entered.

But aside from all these considerations, there is, to my mind, an insuperable objection to giving this order the effect wished for by the defendants. This is strictly a question of power. Had the court of common pleas power, had they jurisdiction to make the order in question? Could they, in any shape, act upon the subject-matter? It is not sufficient that they might once have had jurisdiction, that they might have had it in May, for instance, but the jurisdiction must still remain when the act is done. Turn whatever way we can, view the question in whatever position it has been or can be presented, still the fact remains, and is proved by the record itself, that the order was actually made in August. The court, it is true, attempt to give it effect by directing that it shall "be considered as of May." But this adds nothing to its validity, unless when the direction is given the jurisdiction remains as it was at the time from which the order is directed to be considered. When jurisdiction over any particular subject is withdrawn from a court, the effect is

the same as to that subject as if the court itself was abolished. It will hardly be contended that a *nunc pro tunc* entry could have been made by the direction of those who once constituted the court of probate, or orphans' court, subsequent to the judiciary act of 1803, which "abolished" those courts which would be of any validity. Neither can a court, after any particular jurisdiction has been withdrawn from them, by a similar entry, correct any mistake or error which may have been committed while they possessed the jurisdiction, although the same court continues in existence, and possesses jurisdiction over other subjects. To decide differently, would be to adopt a principle by which a court would be enabled to retain a jurisdiction once possessed, and exercise that jurisdiction contrary to the will of the legislature, merely by making *nunc pro tunc* entries. Such a principle must be fraught with infinite mischief.

This court have now original and exclusive jurisdiction in cases of divorce and alimony. But should the law conferring this jurisdiction be repealed, it can not be admitted that we could continue to exercise this jurisdiction by decreeing divorces *nunc pro tunc*. If it could be done for one year or term, it might for any indefinite length of time. There can be no doubt that such decrees would be *coram non judice* and void. Equally void must be the order of the court of common pleas in the present case, its jurisdiction having ceased when the order was made. Whatever might have been the effect had the jurisdiction remained, under existing circumstances, it can be of no avail.

It is said, however, that the order in question was actually an order of May term; and had the court been abolished upon the close of that term, it would have remained obligatory, and might have been proven by parol. The court of common pleas, whether acting as a court possessing common law jurisdiction, or as a court of probate, is a court of record. The proceedings, orders, judgments, decrees of such courts, do not rest in parol. It is by their records they speak, and there is but one mode, as a general rule, known to the law, by which their acts can be proved, and this is by the record itself. True, there are cases where, after the loss or destruction of a record, you may prove its contents. In such case all has been done by the court which could be done; a record, which is the legal evidence to prove its acts, has been made. The rights of all parties concerned are fixed, and those rights ought not to be affected by time or accident. But before the contents of a record can be

proved, it must be shown that it once existed, and had been lost by time or accident. This shows that the evidence is not introduced to prove the proceedings of a court as resting in parol, but as they once existed of record. But to introduce parol testimony to prove the proceedings of a court of record, and then substitute this testimony for the record itself, would be a novel proceeding. It would be equally absurd as to sustain an action of debt upon bond, upon proof that the defendant promised to make such an instrument as is set forth in the declaration, although the fact should be admitted that the instrument was never executed.

The difficulty in the present case arises from the circumstances that there is no evidence to show that an order was made in May. The parol testimony is competent for the reason just stated, and the order of August is incompetent, because made by a court having no jurisdiction over the subject-matter upon which it was acting.

Another point made is that the order in question is but an extension of the one of May, 1804, and must be considered as a part of the same. This suggestion leads to the necessity of an examination of the order last named. It is in these words: The administrators of the estate of Israel Ludlow, deceased, exhibit an account current, and pray the court to issue an order for the sale of real property to defray the debts due from the estate, etc. John Ludlow and James Findlay, sworn in court, the court order so much of the real property sold as will meet the said demands, except the farm and improved lands near Cincinnati, together with the house and lots in Cincinnati. In virtue of this order, what real estate could be sold? Let us assimilate it to a grant, and certainly it can not be construed to embrace any other property than would be embraced in a grant containing similar or equivalent words. A. grants to B. all his real estate, except a farm and improved lands near a certain place, together with the house and lots in that place. Circumstances might be such as to raise a doubt with respect to the farm and improved land near the place named, but there would be none as to the lots in the place. These are expressly excepted from the operation of the grant, and whether improved or otherwise can make no difference. It is equally clear that the lots in Cincinnati were excepted from sale by the order now under consideration; and so it was considered by the administrators and the court, otherwise the order of August would neither have been applied for nor made.

This appears to have been a separate and distinct proceeding, carried on for the express purpose of subjecting the town lots and some other property not embraced in the former order of sale. It has no further connection with that order than as relates to the description of the property. If this proceeding can be assimilated to a "suit or prosecution" it is a new suit or a new prosecution.

Another point made is that if the law in question was repealed by the general repealing law of 1805, still it could have no effect upon the administration of Ludlow's estate, inasmuch as letters of administration were granted thereon before the latter law took effect. If this position be tenable, it must be either because, by the grant of letters of administration, administrators acquire rights which can neither be taken away nor varied by legislative enactment, or because creditors, by the death of their debtor, acquire an interest in his estate, which must be satisfied according to the laws in force at the time of his death. It is not believed that either such rights or interests have been acquired.

Whether it be good policy to change an administration law, so as to affect an estate already in the course of settlement, may be questionable, but it is not a question for the court now to determine. We are not, however, prepared to say the legislature have not the power to do it.

It has been done not infrequently, and the propriety of the course never questioned, to my knowledge, in any of the courts of the state. The administrator acts in virtue of powers conferred upon him by the statute law, and those powers may be varied, as the exigencies of the country require. So long as he governs himself by the laws in force, he can sustain no injury. At no time has he any interest in the property of the intestate, except as trustee for those who have claims upon the estate as creditors or distributees. This trust is not conferred or reposed in him by the creditors or distributees, but by the law itself.

Creditors do not, by the death of the debtor, acquire any rights to his property, which must necessarily be satisfied in any specific manner. It is proper that their claims should be paid, and with our present ideas of right and justice, we should say that the real, as well as personal estate of the deceased, ought to be applied for that purpose. In some other countries, however, different opinions prevail, and in our own state it is manifest there was a time when this description of property

could not be appropriated for this purpose, through the agency of administrators. Whether there was any other mode by which it could be reached, it is not necessary now to inquire.

The doctrine is sometimes advanced that the creditor, by the death of his debtor, acquires a species of lien upon his property. The nature of this pretended lien I could never fully comprehend. It seems to be something that is indescribable. He undoubtedly has a right to the satisfaction of his debt so far as there is property, which gives a claim that ought to be preferred to that of heirs or distributees. But the manner in which the property shall be disposed of to give him this satisfaction, must depend upon the law in force at the time he attempts to obtain it. It has long been the policy of this state, that judgments should operate as liens upon the lands of the debtor. This lien does not attach in consequence of any natural or conventional right, or in consequence of any influence of the judgment in itself considered, but in consequence of positive legislative enactment. Upon this principle it has been decided that the law giving the lien might be varied or repealed subsequently, so as to effect subsisting judgments. With equal propriety may alterations be made in the law relative to the settlement of intestates' estates, even where the estate is already in a course of settlement.

The view which has been taken of the case renders it unnecessary to determine what is to be understood by the words "suits and prosecutions" as used in the proviso of the repealing law, or what effect the repeal shall have upon sales made by the administrator in pursuance of the order of May term, 1804. There can be no doubt but that many difficulties must be overcome, in order to arrive at a correct conclusion upon either of those points, but it will be soon enough to solve those difficulties when a case is presented rendering it necessary.

Upon the whole, the court are of opinion that previous to the year 1795, there was no law in the territory authorizing administrators to sell the lands and tenements of an intestate.

That the law of 1795, for "the settlement of intestate estates," was the first law giving this authority, and the only one previous to June, 1808.

That this law was repealed, and ceased to have effect from and after the first day of June, 1805.

That the order of the court of common pleas of May term, 1804, directing the administrators of Israel Ludlow to sell a

part of the real estate of said Ludlow, for the payment of debts, did not embrace the premises in controversy.

That the parol testimony offered to prove an order of sale at the May term, 1805, is incompetent.

That the order of said court of common pleas, at the May term, 1805, was *coram non judice*, and void; and that the lessors of the plaintiffs could not be divested of their title in consequence of any act done in pursuance of that order.

Of course the testimony offered by defendants was properly overruled, and judgment must be entered for the plaintiff.

Cited in *Paine v. Skinner*, 8 Ohio, 159, 162, as authority upon the effect here given to the act of 1805, upon the act of 1795, empowering administrators to apply the assets of the estates of decedents in discharge of debts. Followed in *Robb v. Irwin*, 17 Ohio, 697, on the proposition that the propriety of an order made by a court having jurisdiction could not be collaterally inquired into.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

BLEAKNEY v. FARMERS AND MECHANICS' BANK.

[17 SERGEANT & RAWLE, 64.]

RETROSPECTIVE LAWS — WHEN VALID.—An act of the legislature that removes an impediment and allows a contract to be enforced, although retrospective, is not unconstitutional; so held as to an act allowing a corporation to maintain a suit on a note, although the corporation was at the time of taking the note dissolved by failure to pay a certain per cent. of its dividends to the commonwealth, and in consequence thereof all notes taken by it at that time were null and void.

DEBT brought by the Farmers and Mechanics' Bank on a note signed by Bleakney and indorsed by Storer, dated January 20, 1820. Cause tried November, 1825, and judgment for plaintiff. It appeared that plaintiff had failed to pay to the commonwealth six per cent. on its dividends of November, 1819. The court charged the jury that by the failure to pay said dividends, plaintiff forfeited its charter, and that every note taken by it after the first Monday of January, 1820, was null and void; but the act of the legislature of April 1, 1822, restores the bank, legalizes the note which was before illegal and void, and makes it as effectual as if the omission of the bank to pay the commonwealth the six per cent. on their dividends had never existed. Defendants excepted.

Dunlop, for plaintiffs in error.

Crawford and McCullough, contra.

By Court, DUNCAN, J. The plaintiffs in error have confined their exceptions to the answer of the court to the two points made by them. It is objected: 1. That the act is unconstitu-

tional, because it is retrospective and impairs contracts; and, 2. If it was constitutional, still it did not operate on actions pending at the time of its passage.

In a case in principle the same as this, *Hess and others v. Werts*, 4 Serg. & Rawle, 356, it was decided that such legislation was not prohibited. It impaired no contract, but removed an impediment to a contract fairly entered into by the defendant. It is so far retrospective; but every retrospective act is not void. Retrospective laws divesting vested rights working the destruction of a right previously attached, are contrary to the principles of sound legislation; but every retrospective act is not void. An act making that a crime which was not one when committed, is retrospective; but there is a great difference between making an unlawful act lawful and making an innocent act criminal. This law divests no right, but removes an impediment or disability. It renders lawful an act prohibited, as if it had been lawful *ab initio*. It works no injustice, infringes no man's right, it impairs no contract; but takes from the contract the taint which the policy of the law interposed, and gives to the holder of the note a right to recover on the contract, a right which he would have possessed if there had been no legislative interposition. The party is restored to his common law right and common law remedy. In *Ogle v. The Somerset and Mount Pleasant Turnpike Co.*, 5 Serg. & Rawle, 256¹, the constitutionality of the law was not questioned; but the point was, whether the act operated on suits pending.

The second objection, that the act does not operate on this pending suit, is one which has received the fullest consideration of the court; but if it can not be distinguished from *Bedford v. Shilling* [8 Am. Dec. 718], and *Ogle v. The Turnpike Company*, we would not be disposed to depart from the principles established in these cases. The case of *Bedford v. Shilling* was decided on the ground that the word recover might, without violence, be confined to suits commenced after the act, and a subsequent provision showed decisively that this was the meaning. In *Ogle's case* the provision was clearly prospective. "The respective companies shall have the same legal remedy for the recovery of the amount of subscriptions, as if such provision requiring the payment of a certain sum for each share had not been required in the acts aforesaid." And by Chief Justice Tilghman, who delivered the opinion of the court: "When it is said that the turnpike companies shall have the same legal remedy as if the repealed acts had never been

1. *Ogle v. The Somerset and Mount Pleasant T. Co.*, 13 Serg. & Rawle, 256.

passed, it is to be understood that the action is to be in *futuro*, by an action commenced after the passing of the law." But the provision in the act of the first of April, 1822, providing for the closing of the concerns of banking institutions, is differently expressed. It provides, "that the acts and proceedings heretofore done and performed by the board of directors of such bank subsequent to the forfeiture of its charter, if the said acts and proceedings have been done and performed in the manner as they might or could have been lawfully done previous to such forfeiture, be and the same are hereby confirmed and declared valid in law, with the same force and effect as if the same acts and proceedings had been done previous to the forfeiture of such charter." The bringing an action is an act and proceeding; and the act done after the forfeiture is legalized, as if there had been no forfeiture of the charter. The bringing an action is an act which they might have lawfully performed if the charter had not been forfeited; and the act is in language so plain that it would be affectation or stupidity to misunderstand it; it ratifies the bringing of the action, as if it had been done before the forfeiture, and gives it the same force and effect. It is the very case provided for; and if it did not mean to embrace it, it meant nothing. It is to operate on all the past acts and proceedings of the bank, all those acts and proceedings theretofore done.

The cases of *Bedford v. Shilling* and *Ogle v. The Turnpike Co.* were decided on the words of the several acts of assembly, where the remedy was prospective; but this act of assembly legalizes the act done—all that could have been done had there been no forfeiture.

The construction of the court of common pleas on the healing nature of the provision of the act of assembly was the true and legal construction, and the judgment is therefore affirmed.

Judgment affirmed.

Cited in *O'Brien v. Logan*, 9 Pa. St. 99; *Dale v. Medcalf*, Id. 110; *Lycoming v. Union*, 15 Id. 171; *Weister v. Hade*, 52 Id. 480; *The Marble Building Association v. Hocker*, 3 Phil. 505.

RETROSPECTIVE STATUTES, WHEN VALID.—See *Bedford v. Shilling*, 8 Am. Dec. 401; *Foster v. Essex Bank*, Id. 135. Where such statutes have been considered invalid, see *Dash v. Van Kleeck*, 5 Am. Dec. 291; *Starr v. Robinson*, 6 Id. 732; *Merrill v. Sherburne*, 8 Id. 52; *King v. Dedham Bank*, Id. 112. Statutes should always be construed so as to deprive them of any retrospective effect, especially if, by such a construction, vested rights would be interfered with: *Dash v. Van Kleeck*, 5 Am. Dec. 291, note 315. *Goshen v. Stonington*, 10 Id. 121, note 131. As to what statutes are not retrospective, see *Jones v. Jones*, 5 Am. Dec. 645.

FRIEDLEY v. HAMILTON.

[17 SERGEANT & RAWLE, 70.]

MORTGAGE, WHAT IS.—A deed absolute and a defeasance constitute a mortgage.

DEFEASANCE, EFFECT OF FAILURE TO RECORD.—A deed absolute accompanied by a defeasance, will, if the defeasance is not recorded, although the deed is recorded, be treated as an unrecorded mortgage and postponed to the lien of a subsequent judgment.

WRIT of error to the court of common pleas of Montgomery county. Friedley, jun., on May 24, 1817, conveyed certain real estate to Friedley, sen., in fee simple, in consideration of six thousand dollars; which deed was acknowledged and recorded August 2, 1817. On the same day, Friedley, sen., executed and delivered a deed of defeasance to Friedley, jun., setting forth that his deed was intended as a mortgage, to secure the payment of six thousand dollars, and agreeing to reconvey upon a day certain, upon the payment of said sum. The defeasance was never recorded. Defendants obtained judgment against Friedley, jun., on July 28, 1871. The court charged that the deed and defeasance constituted a mortgage; but that, as the defeasance was not recorded, it was an unrecorded mortgage and had not a preference over defendant's judgment. This charge was assigned as error.

Kittera and T. Sergeant, for plaintiff in error.

Rawle, jun., contra.

By Court, GIBSON, C. J. Deeds, which are parts of the same transaction, constitute but one instrument. The mortgage, in this instance, for such it undoubtedly is, consisted of an absolute conveyance and a bond with condition to reconvey on payment of six thousand dollars by the grantor. The absolute conveyance has been recorded; but according to the letter of the act of assembly, the mortgage, which consists of all its parts, has not; and it remains to be seen whether it be well recorded within the equity of the act.

The sum of the argument in support of the affirmative, is, that as the parties interested were bound to take notice of the absolute conveyance, which was, undoubtedly, well recorded, enough was done to lead to an inquiry into the true nature of the transaction which is said to be equivalent to full notice. Constructive notice from facts is a conclusion of law, which can be drawn only from facts actually within the knowledge of the party, and never from those of which he had only constructive

notice; else we should have construction on construction and inference on inference, without beginning or end. In *Simon v. Brown*, 3 Yeates, 186 [2 Am. Dec. 368] and *Heister v. Fortner*, 2 Binn. 40 [4 Am. Dec. 417], a deed recorded without a proper probate or acknowledgment was held to be notice of nothing; and I apprehend the effect would have been the same had the person to be affected actually seen the registry. To affect a party with constructive notice, though often a necessary measure on grounds of public policy, is always a harsh one; and for this reason the courts have not dispensed with the most trifling circumstance required by the legislature; as in the cases just cited. The registry of a deed was intended itself to contain all the essential parts of full and complete notice of every fact necessary to be known, instead of barely putting the party on the scent and requiring him to run all round the world after the grantor and the grantee, seeking information as to the true nature of the transaction. The deed recorded here was notice of nothing but what it purported to be, and by that the creditor was informed that the land had been conveyed unconditionally. What reason had he to suppose that the fact was otherwise? and if he had none, what was there to put him on inquiry? But what if he had inquired of the parties, and they had refused to answer? The recording acts were intended to guard against injury from secret conveyances; and distinct provisions are made for purchasers or mortgagees, and for creditors.

In *Heister v. Fortner*, already cited, and in *Rodgers v. Gibson*, 4 Yeates, 112, it was held that a judgment-creditor is not a purchaser, and so not within the purview of the act of 1775; and this, I presume, because he can not be prejudiced by ignorance of an absolute conveyance which leaves nothing in the debtor to answer his demand, and it is, therefore, not necessary to his protection that he should have notice of it. But in the case of a defeasible deed he would be apprised of the existence of an interest still in the grantor, which might by proper diligence be levied on by an execution, so that the existence of the defeasance is the only thing which it would be beneficial for him to know. For this reason it is the legislature provided in the act of 1715, that without recording, "No deed or mortgage, or defeasible deed in the nature of a mortgage, shall be good or sufficient to convey or pass any freehold or inheritance," unless such deed be recorded six months from the date, a provision which is not applicable to other conveyances. It would seem the legislature had in view the prevention of the very mischief

which is complained of here, by enacting that no conditional conveyance which is not fully recorded shall stand in the way of an execution by a creditor in favor of whom the estate is to be considered as still in the grantor. It is evident, then, that what is a sufficient registry in the case of a purchaser may be otherwise in the case of a creditor. We will suppose, what may be reasonably suspected in the case before us, that the conveyance is a contrivance to keep creditors at bay indefinitely, or till the grantor tender a sum, actually due, which may be inconsiderable in comparison with the value of the property; what beneficial end would there be obtained from inquiring of the parties whether they meditated a fraud? To say that fraud, without the aid of the recording acts, would be sufficient to avoid the deed, is to say nothing. Fraud might exist without a possibility of detecting it, and it is precisely in such cases that the recording acts operate most beneficially by suspending the necessity of proof of actual fraud. Nor is it better to say that the refusal of the parties to declare the truth, in case of being inquired of, would furnish full proof of fraud. The existence of what purports to be an unconditional conveyance is not a reason to suspect the existence of a defeasance or declaration of trust, and this, as I have said, is a good excuse for the want of an inquiry. The registry of defeasible deeds was intended to be for the benefit of both creditors and purchasers, but what benefit a creditor can derive from the registry of part of a mortgage which has a direct tendency to mislead in a point essential to his interest, I am at a loss to conceive. It would be better for him that the absolute part of the conveyance were not recorded, as he would then discover no apparent obstacle to obtaining satisfaction by execution of the land. By a trick of this sort it is evident that the debtor's estate might be effectually covered from his creditors, if a creditor might collude with him, without risk of losing what is actually due.

I do not pretend that the registry in this case is insufficient to give the bond and conveyance the effect of a mortgage between the parties, or, perhaps, against a purchaser (and the decisions of this court have actually gone no further), but it is different in regard to a creditor who is entitled to notice, by the registry of every fact that may affect his interest.

The legislature of New York has specially required deeds of defeasance to be registered, from which it may be inferred that experience had shown the practice of registering defeasible deeds as absolute conveyances to be mischievous. With us,

however, such cases fall within the general provisions of the act of 1715, in the letter or spirit of which there is nothing to exclude them. Even were the matter open to construction, I would hold an omission to record any part of a mortgage to be fatal.

ROGERS, J., and HUSTON, J., concurred.

TOD, J. Was the deed to Henry Friedley, sen., of the twenty-fourth of May, 1817, null and void as against the subsequent judgment of Hamilton and Wood, solely because, though recorded in due time, the defeasance which made it a mortgage was not also recorded? I think not. In my opinion the act of assembly does not require any such recording, nor the use of the country, nor the decision of any court, nor the interest of any individual except the mortgagor. He may suffer by his own default in omitting to get his defeasance recorded. No other person can.

If it is not so, then, it seems, a mortgagor has nothing to do but withhold his defeasance from the record to defeat his own conveyance. The defeasance belongs to him, it must be delivered to him, it goes into his hands by the very act of completion, and never into the hands of the mortgagee, whose interest is not to preserve but to destroy it. It will be admitted that our act for recording deeds is not like those British statutes which require a register of every contract for the sale of annuities. I believe it was never heard of, that our law was intended to prevent imposition upon the grantor or mortgagor, or to prevent collusion between the grantor and grantee, but solely to prevent imposition upon subsequent mortgagees or purchasers, or creditors, for want of the means of knowing that the former owner had parted with his interest in the land, or some portion of it. Clearly, the record which shows a man to have parted with his whole interest, will prevent, as far as recording can prevent, all subsequent deception. It takes away all credit arising from the land. *Omne majus continet in se minus.*

It would seem to me that if the court below was right in holding the deed to be void, as against the subsequent judgment, and the mortgagee not entitled even to the amount really due him from the mortgagor out of the purchase-money on the sheriff's sale, then, for the sake of consistency, they must also decide that a judgment entered by default or in any other mode, as is every day the case, for a sum larger than the real claim of the plaintiff, is void as against subsequent judgments, and not valid even for the just debt; a notion which I take to be contrary

to the practice in every county in the state. On the same principle the most regular mortgage, containing defeasance and all, if for more money than is really due, ought to be void totally; and a judgment-creditor or mortgagee who receives one half of his debt without giving credit for it upon the record should forfeit the residue. How, then, shall we dispose of the cases of *Lyle v. Ducomb*, 5 Binn. 585; *Shirras v. Craig*, 7 Cra. 50,¹ and numberless others? In the last-named case the mortgage was for a large sum, but the money was not due, it was for advances to be made, liabilities to be incurred. Besides, the deed misrepresented the transaction. But, says Marshall, C. J., "it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation." In *Lyle v. Ducomb*, the mortgage was for nine thousand dollars; but not a penny was due at the time of the execution, nor was it certain that anything ever would be due. And another point in that case, more precisely applicable to the present, was, that the second indorsement, which was relied upon solely to fix the *quantum* of debt and the terms of redemption, and which gave character to the whole transaction, was not recorded at any time, as appears by the case, certainly not before the adverse lien had attached. Yet Judge Yeates, who dissented from the majority of the court, did not mention the want of recording the defeasance as an objection, nor was it mentioned by the counsel in the argument. And in *Wharf v. Howell*, 5 Binn. 499, so perfectly unconscious was Chief Justice Tilghman of the necessity of recording the separate defeasance of a mortgage, that he says, "if the mortgagee uses common care he will have the defeasance recorded, or keep a copy," evidently implying that to keep a copy is as safe to the mortgagee as to have the entry on the record, and expressly declaring that, in his opinion, to keep a copy is to use common care.

I take the rule to be settled that a deed for land, absolute and unconditional on its face, if intended to be merely a pledge for the payment of money and redeemable, may be shown to be so by circumstances and by parol proof. For this it will be sufficient to cite *Wharf v. Howell*, 5 Binn. 499; *Dabney v. Greene*, 4 Hen. & Mun. 101 [4 Am. Dec. 503]; Prec. Ch. 526; 2 Atk. 98; 3 Id. 388; Pow. on Mort. 200, 201; 2 Hayw. 26. Now if we say that old Friedley is not entitled to take out of court the

1. *Shirras v. Craig*, 7 Cranch. 50.

money which he can show to be fairly due to him upon the mortgage, we must, as it appears to me, either disregard all the above authorities, or we must decide that a mortgage, having its defeasance in writing separate and unrecorded, is absolutely nothing against a subsequent incumbrance, while the same paper, had its defeasance been by parol only, would be good and conclusive; that is, if I understand the matter, we should establish a rule making a difference between the two cases without any conceivable reason for it, a rule which may be evaded by the parties by the easy contrivance of having a verbal instead of a written clause of redemption.

The only semblance of direct authority, cited for the defendant in error, was *Dunham v. Day*, 2 Johns. Ch. 188¹. That decision has been reversed on this very point in the court of error: 15 Johns. 555 [8 Am. Dec. 282]. Besides, the case of *Dunham v. Day*² was put by the chancellor on the words of the statute, which differs from our law. So in Massachusetts, by an act of 1802: "No conveyance of any land, unless for a term less than seven years, shall be defeated or incumbered by any bond or other deed, or instrument of defeasance, unless they are registered:" *Kelleran v. Brown*, 4 Mass. 445. Now, we have no such statute in Pennsylvania, and the very fact of their existence in New York and Massachusetts, shows that without them the law in those states would have been otherwise.

I admit that in a conveyance between father and son, an unrecorded defeasance may be a suspicious thing. So there might be just ground of suspicion, if no defeasance at all. In either case, fraud is inquirable into by the jury. The question should have been left to them. Even if fraud was apparent (of which, by the way, there is no evidence on this record), I would still think the court below was in error, to obviate a fraud in a particular case, by attempting an amendment of the law by an *ex post facto* decision.

Judgment affirmed.

This is a leading case in Pennsylvania, and the doctrine there decided has been repeatedly reaffirmed in that state: *Miller v. Musselman*, 6 Wh. 358; *Barney v. Sutton*, 2 Watts, 40; *Garber v. Henry*, 6 Id. 59; *Jacques v. Weeks*, 7 Id. 268; *McLanahan v. Reeside*, 9 Id. 510; *M. and M. Bank v. Bank of Pa.*, 7 W. & S. 340. The rule, as established in the principal case, was somewhat moderated in *Jacques v. Weeks*, 7 Watts, 261, it being there held that a record of a deed, as stated in the principal case, was sufficient, if the mortgagee went into possession; and with this modification, the principal

1. *Dey v. Dunham*, 2 Johns. Ch. 188.

2. *Dunham v. Dey*, 15 Johns. 555 [8 Am. Dec. 282.]

case may be considered as stating the law as the same now exists in Pennsylvania: *Russell's Appeal*, 15 Pa. St. 322; *Moroney's Appeal*, 21 Id. 375; *Wilson v. Shoenbeger's Ex.*, 34 Id. 124; *Britton's Appeal*, 45 Id. 176; *Hibberd v. Bovier*, 1 Grant's Cases, 266.

DEEDS, WHEN CONSIDERED MORTGAGES.—*Belton v. Avery*, 1 Am. Dec. 70; *Washburn v. Merrill*, 2 Id. 59; *Dunham v. Dey*, 8 Id. 282.

WITMAN v. LEX.

[17 SERGEANT & RAWLE, 88.]

STATUTE OF USES.—The statute of 43 Eliz., c. 4, of charitable uses, is not in force in Pennsylvania, but the principles of it, as applied by the English chancery courts, obtain there by force of the common law of that state.

CHARITABLE BEQUESTS, WHEN VALID.—A bequest to a church, to be annually laid out in bread for the poor, is valid. Also a bequest to trustees to invest the same and apply the interest towards the education of young students.

ACTION brought by plaintiff against Lex, the surviving executor of Woelpper's will, to recover a portion of his share, as residuary legatee of the estate of Woelpper, deceased. Defendant claimed as credits in his account: 1. A bequest of five thousand dollars to himself in trust for the German Lutheran church; 2. A bequest paid to the St. Michael's and Zion's churches of one thousand dollars. After the payment of said bequests, Woelpper bequeathed the balance of his estate to plaintiff and two others, equally as tenants in common. Verdict was taken for plaintiff for one third of the amount of the two bequests, subject to the opinion of the court. The other facts appear in the opinion.

J. R. Ingersoll and C. J. Ingersoll, for plaintiff, cited: 2 Fonbl. 211, 213, 219; 3 Bl. Com. 427; 2 Id. 376; Roberts on Wills, 213; 5 Vin. Abr. Charitable Uses; 2 Vern. 118; 2 Id. 387; Stat. 9 Geo. II., c. 36; 4 Co. 104; 2 Ch. Cas. 18; 5 H. & J. 892; 6 Id. 1; 8 Serg. & R. 45; 11 Id. 104; 11 Wheat. 153.

Randall and T. Sergeant, contra, 3 Binn. 596, Charter of Pennsylvania; 1 Dall. 67; 6 Co. 22; 2 P. Wm. 119; 1 W. Bl. 91; 2 Vern. 342; 1 Bro. Ch. C. 15; 1 H. & M. 470; 12 Mass. 537, 546; 13 Id. 371; 7 Id. 319; 1 Day, 35; 7 Johns. Ch. 292; 6 Serg. & R. 12; Pow. Dev. 421; Mease Picture of Philadelphia, 338-341; Const. 1776, 5 Sm. L. 43.

By Court, GIBSON, C. J. The will of George Gottfried Woelpper contains two bequests, which are said to be void for uncertainty. The first is a bequest to "St. Michael's and Zion's

churches" of one thousand dollars, the interest of which is directed to be laid out, for ten years, in bread "for the poor of the Lutheran congregation," of which the testator was a member. The second is a bequest of five thousand dollars, to be put out in such manner that the interest shall be applied "towards the education of young students in the ministry of the German Lutheran congregation, under the direction of the vestrymen of St. Michael's and Zion's churches." These churches were jointly incorporated by the style of "the ministers, vestrymen, and churchwardens of the German congregation, in and near the city of Philadelphia, in the state of Pennsylvania."

At the common law of England, these bequests could not be sustained, even where there is no uncertainty as to the person; if the bequest be on a trust not defined with reasonable certainty it will fail; for it is clear the testator did not intend that the trustee should have the beneficial interest. Such a bequest, however, would take effect under the 43 Elizabeth, c. 4; and this has drawn the counsel to argue against the extension of that statute to this country, a point that must be conceded. But we consider the principles which chancery has adopted, in the application of its principles to particular cases, as obtaining here, not, indeed, by force of the statute, but as part of our own common law; and where the object is defined, and we are not restrained by the inadequacy of the instrument which we are compelled to employ, nearly, if not altogether, we give relief to that extent that chancery does in England. And this part of our system has been produced by causes which worked as powerfully here as did those which produced the system of relief that sprung from the statute of charitable uses. The simplicity which marked the lives of our forefathers, enabled them to do without many institutions that in the present state of society are absolutely indispensable. Incorporations were almost unknown; yet to all sorts of pious and charitable associations, in every part of the province, valuable bequests were made by those who were ignorant of the niceties of expression necessary to accomplish the object at the common law, and who were not impressed with an opinion that it was at all necessary to consult counsel. Of this, the will of the celebrated Dr. Franklin, which contains a bequest of money to be loaned for five years to young mechanics, is a striking instance. Yet such bequests have hitherto taken effect, without a question as to their validity. There are few worshiping congregations of any pretensions to antiquity, who have not derived a part of their property

from testamentary donations that would have failed on the principles of the English common law. Nothing was more frequent than bequests to unincorporated congregations without the intervention of trustees; and even where there was a corporation, it frequently happened that the corporate designation was mistaken, or the trust vaguely defined, notwithstanding which, the testator's bounty was uniformly applied to its object. Surely a usage of such early origin and extensive application may claim the sanction of a law, resting, as it does, on the basis of all our laws of domestic origin—the legislation of common consent. The inquiry then is, How far are the English decisions applicable to our circumstances? Chancery has gone an immeasurable distance beyond the statute, two words in the preamble having been laid hold on as the germ of a system of decisions, whose principles are not to be traced to any of the enacting clauses. It is recited in the preamble that lands, tenements, goods, etc., had been “given, limited, appointed, and assigned,” to certain enumerated charitable purposes, which had not been employed according to the charitable intent of the givers; to remedy which, it is enacted that the chancellor may appoint commissioners to inquire of breaches of the trust in any such case, and make such orders and decrees as may be necessary to reform abuses, and compel an application of the fund to the objects contemplated by the donor. The rest consists of details necessary to carry the powers thus granted into effect. There is, therefore, no direct provision to establish a gift by supplying defects in the conveyance, or to aid it in respect of the words used, or the person to whom given; yet it has generally been held that the statute supplies all defects of assurances, when the donor is of capacity to dispose, and has an interest which he may transfer: so that a conveyance to a copyholder without a surrender, or by tenant in tail without a fine, or by a reversioner without attornment or enrollment, is taken to be a good limitation and appointment within the statute; and a gift of land to churchwardens, though void at law, was decreed in chancery by force of the words “limited and appointed,” used in the preamble. So, also, of a gift of money for the use of the church of Dale. “A devise to the poor people maintained in the hospital in the parish of St. Thomas, in Reading, forever,” was held good, although the poor, not being a corporation, were incapable of taking by that name; and it was decreed that the mayor and burgesses of Reading, who were a corporation, and had, in fact, the government of the hos-

pital, should take for the benefit of the poor. So a devise that the parson and churchwardens in Thames street, London, and four honest men of that parish, should sell the land and employ the money for the poor and charitable uses in that parish; although the parson and churchwardens were not a corporation to take land out of London, or to sell it for such uses. These instances are taken from Viner, Charitable Uses, A. B., to show that chancery graduates the relief, not so much by the provisions of the statute, as the necessities of the occasion. So that it may be said most of the decisions are independent of the statute, and, therefore, in a great degree applicable to the same wants and necessities elsewhere.

It is not intended to attempt an outline of this branch of our equitable jurisdiction, or to point out those particulars in which it differs from that which has been assumed in England. This must be a matter of gradual development, according to the exigency of the cases that may arise. It may safely be suggested, however, that in many particulars the relief which we shall be able to afford through the medium of common law forms, will necessarily fall short of that which would be administered by a chancellor. Indeed, no one would desire to see the doctrine of *cy pres* carried to the extravagant length that it was formerly, or witness the exercise of an arbitrary discretion in giving effect to a general intention to leave a sum of money to charitable purposes, to be designated thereafter, by disposing it to such charities as the court chooses to direct. No such discretion would be exercised by this court. On the other hand, not professing to found our jurisdiction on the statute, we are not bound, like the English courts, to restrain it to two cases specifically enumerated in the preamble; and there is, therefore, little hazard in affirming that a bequest, such as in *Morice v. The Bishop of Durham*, 9 Ves. 399, in trust to pay debts and legacies, and to dispose of the residue to such objects of benevolence and liberality as the legatee may approve, would be sustained here. For the present it is sufficient to say that it is immaterial whether the person to take be in *esse* or not, or whether the legatee were, at the time of the bequest, a corporation capable of taking, or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects; or whether their corporate designation has been mistaken. If the intention sufficiently appears on the bequest it would be held valid.

Since the argument of this cause and that of *The Trustees of*

the Baptist Church v. Shewell's Executors, which depend on the same principles on which it is deemed unnecessary to bestow a particular consideration, the public has been deprived of the services of two very valuable members of the court, Chief Justice Tilghman and Mr. Justice Duncan, who, we have the pleasure to say, concurred in the opinion which is now expressed.

Judgment for the defendant *non obstante veredicto*.

This case is a leading case in Pennsylvania on the validity of charitable bequests, and is cited in *Mayor of Phila. v. Elliott*, 3 R. 171; *Methodist Church v. Remington*, 1 W. 225; *Martin v. McCord*, 5 Id. 495; *Beaver v. Filson*, 8 Pa. St. 335; *Price v. Maxwell*, 28 Id. 34; *D. & F. Miss. Society's Appeal*, 30 Id. 434; *McLain v. S. D. of W. T.*, 51 Id. 199; *Miller v. Porter*, 53 Id. 299; *Zeisweiss v. James*, 63 Id. 469.

STATUTE OF USES and the law of bequests to charitable institutions are fully and at length discussed in *Dashiell v. Attorney-general*, 9 Am. Dec. 572, and the note thereto, p. 577.

KEARNEY v. TANNER.

[17 SERGEANT & RAWLE, 94.]

ASSUMPSIT—MAY BE MAINTAINED, WHEN.—An agreement by a vendee that he will pay a mortgage existing on the land purchased is binding, if such mortgage forms a part of the price of the land; and if the vendor subsequently pays the same, by virtue of his personal liability, assumpsit for money had and received lies; but it must appear that the money has been actually paid.

ERROR to the district court of the city and county of Philadelphia. Assumpsit. Verdict and judgment for Tanner, the defendant in error and plaintiff below.

In 1820, Tanner, Kearney, and two others were engaged in business, and Kearney, being desirous of retiring, sold his interest to Tanner for three thousand dollars. In payment, Tanner gave his notes for one thousand one hundred dollars, which were subsequently paid, and also conveyed to Kearney a house and lot at the price of three thousand dollars, incumbered by mortgages of Tanner amounting to one thousand four hundred dollars. The mortgages remaining unpaid, were foreclosed, the property sold, and the price realized applied towards the payment of the mortgages, leaving a deficiency of eight hundred and twenty-four dollars and thirty-one cents, which was paid by Tanner. It appeared that the payment was made by satisfying the old mortgages and giving new ones on different property; but no cash was paid. The court instructed the jury: 1. Did the defendant purchase the property subject to these incum-

brances? If so, it is a part of the contract to pay them, there being no fraud or circumvention; 2. Did the defendant thus undertake to pay these incumbrances; if so, the plaintiff must recover. Defendant excepted.

Randall, for the plaintiff in error.

T. Sergeant and S. Levy, contra.

By Court, ROGERS, J. It has been erroneously supposed that it was adjudged by the late Judge McKean, that a purchaser of mortgaged premises made himself personally liable to the mortgagee for the amount due on the mortgage. If such had been the decision, it was well calculated to create alarm, as the assertion by high authority, of a principle heretofore not so understood by the profession, and most extensive in its operation. I was pleased to find, on a careful examination, that this does not appear to have been his opinion. The charge of the court admits of this construction, and when fairly considered no other meaning can fairly be collected from it; that when there was an agreement that the vendee should pay the mortgage money, and afterwards the vendor had been compelled to pay the amount due on the mortgage, he could sustain an action for money paid, laid out, and expended against the purchaser. That an action will lie, where there is a special agreement either express or inferred from circumstances, is not denied, for it forms part of the purchase-money or price of the land, which it is just and in compliance with his agreement that the vendor should pay. But the defendant contends there was no such agreement, and that as there was no actual payment of money by Tanner, the common money counts can not be sustained. The facts necessary to raise the only point in the cause are fully stated in the bill of exceptions. It is not pretended there was an actual payment of the money, nor was there what has been considered in some cases as equivalent. The parties continue the same, the debt the same, but the security for the money is changed from a judgment which is a general lien, to a mortgage which is specific. And this distinguishes the case from *Slaymaker v. Gundacker's Executors*, 10 Serg. & R. 75, where the debt, as well as the securities, were changed. Gundacker ceased to be liable on the old note, and Slaymaker alone was liable to the bank, whose agents considered it as a payment of the note on which Gundacker was indorser. The situation of Kearney is in no respect changed by the transaction which is alleged to amount to payment. What is the neces-

sary evidence to support an action for money paid, laid out and expended, is clearly and explicitly ruled in the case of *Morrison v. Berkey*, 7 Serg. & R. 238. A surety for another on a bond, who gives the obligee a new bond with surety and a warrant of attorney on which judgment is entered up, but no money is paid, can not recover against the principal in an action on the common money counts for money paid, laid out, and expended. A specific article, or security advanced for another, is not money paid on his account. To recover on a general count for money paid, it should appear to be money actually and necessarily paid to the party's use. There must be an actual advance of money. The same principle is again operative in the case of *Doebler v. Fisher*, 14 Serg. & R. 179, and in divers analogous cases decided on the common count for money had and received. After such repeated recognition of the principle that there must be an actual payment of money, it would be unreasonable now to overthrow what has been so solemnly adjudged. It is better to suffer partial inconvenience than that the law should have the appearance of having vibrated between two opinions. If the rule, *stare decisis*, has any application, it is here; and we have the less reluctance in adhering to these cases, as we consider this a mere question between a general and a special declaration. It is to be remarked that there is no room for the presumption that the money was in fact paid by Tanner. The record negatives every presumption of the kind.

We have no doubt the plaintiff had a right to withdraw from the jury the demand of ground rent.

Judgment reversed, and a *venire facias de novo* awarded.

Cited in *Trevor v. Perkins*, 5 Wh. 253.

LEVY v. CADET.

[17 SERGEANT & RAWLE, 126.]

STATUTE OF LIMITATIONS.—The acknowledgment by one partner of a partnership debt, after the dissolution of the partnership, does not deprive the other partner of the benefit of the statute of limitations.

ACTION brought July 20, 1824, by Levy, on a promissory note against Cadet and Hipple, dated May 26, 1816. Cadet and Hipple, were partners when the note was signed, but the partnership was dissolved in the latter part of 1816. Cadet suffered default. Hipple pleaded non-assumpsit; and *non assumpsit*

infra sex annos. At the trial Cadet made an unqualified acknowledgment of the debt, and declared it had not been paid. Verdict for plaintiff. Defendants move for a new trial.

Phillips and Ingersoll, for plaintiff in error. The acknowledgment of one of the partners after six years takes the case out of the statute against both: Chitty on Bills, 479; 2 Doug. 651; 2 H. Blk. 340; 3 Campb. N. P. 31; 6 Johns. 267; 15 Id. 3; 2 Bay, 533; 1 Taunt. 103; 4 Binn. 375; 9 S. & R. 416; *Burham v. Raynall*, 3 Munf. 191; 2 Hawk. 209; 4 T. R. 576; 16 East, 420; 2 Burr. 1099.

Atherton and Binney, contra: 1. That nothing will stop the statute, after it has commenced to run; 2. There is no power in the partners to bind each other after dissolution of the partnership, and the expiration of the six years: 3 Esp. 108; 2 Johns. 300; 3 Id. 536; 4 Id. 424; 11 Id. 146; 2 B. & C. 12; 1 Id. 248; 8 Cranch, 78; 7 Price, 193; 1 Taunt. 104; 16 Ves. 57.

By Court, ROGERS, J. If this question were *res integra*, the court would have no difficulty. The construction of the statute of limitations is embarrassed with decisions, from an indisposition in courts of justice of former times to carry its wholesome provisions into effect, which it would be a hopeless task to endeavor to reconcile. An attempt to do so would confuse rather than elucidate the point now under review, which in Pennsylvania is new, and of some interest. In the modern cases, the statute has been considered as entitled to some respect, and not to be explained away. With this disposition I approach the point raised on the record.

The act of assembly provides that the action shall be commenced within six years next after the cause of action, and not after. The statute bars the remedy, but does not extinguish the debt. The debt remains *in foro conscientiae* as obligatory after the expiration of the six years as before; hence it is, that the indebtedness has always been considered a good consideration for a new promise. We shall be greatly assisted in our inquiries, in the first place, by ascertaining in what manner in Pennsylvania a case is taken out of the act of limitations. There must be a new promise, either express or implied, to have this effect. The acknowledgment of the debt does not take the case out of the act, but it is a fact from which a new promise may be inferred; and for this we have the authority of the supreme court in the leading case of *Jones v. Moore*, 5 Binn. 573 [6 Am. Dec. 428]. The chief justice, in delivering the

opinion of the court, has investigated all the cases, and has deduced the principle to which I have just referred, which has since been considered as the text law in this state. The fact of a new promise is left as any other fact to the jury, with directions from the court to infer a promise, unless there is something in the evidence from which a contrary inference must be drawn. It is a legal presumption which, without more, the jury are not permitted to disregard. The inquiry always is, whether there is sufficient evidence of a new promise to pay, and without it the plaintiffs are not entitled to recover, whatever opinion the jury may have formed as to the payment, or actual discharge of the debt. It is to be regretted that this salutary rule has been departed from; for by keeping it steadily in view, much difficulty, with which we are continually embarrassed in the construction of the act, would have been avoided, and strict adherence to principle would have put the party to his suit on the new promise, would have prevented a recovery on the old pleadings, and would have rendered incompetent the proof of a promise after the commencement of the suit. It is now understood that the plaintiff may declare on the original cause of action, although he relies on the new promise. Without multiplying authorities, it may be sufficient to observe that the whole current of cases in Pennsylvania is in accordance with these principles, for the case of *Jones v. Moore* has never been questioned. It remains, then, to inquire into the power of a partner after the dissolution of the partnership. Whenever a partnership is dissolved the object of the association is terminated, and nothing remains to be done except the arrangement of the affairs of the partnership; and until they are settled, as between the parties, the partnership may be said to continue. Engagements may be contracted which can not be fulfilled during its existence, exposed as partnerships are to sudden and extraordinary terminations. For the purpose, therefore, of making good outstanding engagements, the partnership must in legal contemplation have a continuance, although, as between the parties themselves, it is actually determined: *Gow. on Part. 212*. Beyond this the power of former partners to bind each other does not extend. After the dissolution of the partnership they are not the agents of each other, except for the purpose of making good outstanding engagements. They can not enter into a new contract or engagement for their former partner. They have no authority, either express or implied, for any such purpose; nor does necessity or

public convenience require that they should. They become so disunited in interest that the one can not by any contract or engagement implicate the credit of the other: Gow. on Part. 310. "The authority," say the court, in 4 Johns. 227, "which exists during the continuance of a partnership, for one partner to bind his copartner, ceases on its dissolution." Again, in 3 Johns. 538: "After the dissolution of a copartnership, the power of one partner to bind the other wholly ceases."

In many, and indeed in most cases, one of the partners is by agreement exclusively authorized to arrange their joint affairs, and to receive the partnership credits, as the fund out of which to discharge the partnership debts. The other partner, in many cases, is ignorant of the details of the business, particularly when he is acquainted with, and satisfied with the result. It would be dangerous to say that under such circumstances his acknowledgment should charge the former partner; for it is to be remembered that the statute was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, although the evidence of discharge may have been lost: 8 Cranch, 74.

After settlement of the accounts, many persons become careless of their vouchers, which may be lost by time or accident. To expose persons in such situations to the risk of being saddled with debts at an indefinite length of time, which may have been discharged, by the acknowledgment of a person ignorant of the fact of payment, or from insolvency, and perhaps malice, reckless of the consequences, is a principle which I am unwilling to sanction. Persons so exposed are those whom the statute was intended to protect. It gives them a shield of which they can not be deprived without their own consent. We can not have a stronger illustration of the propriety of the rule than is presented by this very case. The solvent partner, Hipple, claims the protection of the act; it is the insolvent, Cadet, who not only wishes to waive the benefit of the act for himself, but for Hipple also. Whether the debt has been paid, I know not, nor is it material. It is sufficient for me that the six years from the time the action arose has expired, and that Hipple has neither promised to pay the money, nor has he made any acknowledgment from which a promise may be inferred. On the contrary, he claims the protection of the statute; and, in the opinion of the court, he is entitled to its benefit. We have carefully examined the cases cited in the argument, all of which,

whether in England or in sister states, have been brought by the research of counsel in review before us, and although entitled to great respect, as evidence of the law, are not authority here. However differently settled elsewhere (which does not distinctly appear), yet in Pennsylvania, in carrying out the great leading principle of the statute of limitations, we come to the conclusion that one partner can not, after the dissolution of the partnership, bind the other so as to deprive him of the benefit of the act. It will be observed that we do not place the question on the fact that the promise was made after the six years had expired, but on the general principle, which, in the opinion of the court, covers the whole ground.

It may be sufficient to observe, that the remaining points have been considered, and that they do not avail the plaintiff.

New trial awarded.

CITED in *Houser v. Irvine*, 3 W. & S. 347; *Schoneman v. Figley*, 7 Pa. St. 437; *Coleman v. Forbes*, 22 Id. 162; *Hogg v. Orgill*, 34 Id. 348; *Reppert v. Colvin*, 48 Id. 253. In *Hogg v. Orvill*, 34 Id. 348, Thompson, J., in approving the principal case, said: "In *Levy v. Cadet*, 17 S. & R. 126, it was held that the admissions of the existence of a debt by a partner, after dissolution of the firm, did not preclude his copartners from pleading the statute of limitations. This was directly in conflict with the rule in England on the subject, in *Whitcomb v. Whiting*, Doug. 652, which is evidently the foundation of the rule stated by Mr. Collyer. In *Houser v. Irvine*, 3 W. & S. 247, the case of *Levy v. Cadet* is reaffirmed by Gibson, C. J., who had delivered the opinion in the former case."

PARTNER'S AUTHORITY after dissolution is treated in the note to *Charlton v. Oliphant*, 6 Am. Dec. 574.

STARRETT v. WYNN.

[17 SERGEANT & RAWLE, 130.]

SEPARATE ESTATE OF WIFE, WHAT IS.—Property acquired by a wife, while deserted by her husband, is her separate estate, and she may dispose of it by will or otherwise.

WRIT of error to the court of common pleas of Chester county. Trespass brought by plaintiff against Wynn for seizing on certain personal property as constable, as the property of one Reuben Starrett. The property once belonged to Starrett, but had been sold under execution to his sister Mary, and bought in by her, and by her will left to the plaintiff, a son of Reuben. At the time of making the will Mary was a *feme-covert*, having been married in 1812 to one Gibson. It appeared that from the date of their marriage to the death of

Mary in 1821, her husband had deserted her and gone to Canada and married another woman, and had never in any way supported Mary, or ever made any claim to any of her property. At plaintiff's request the court charged the jury as follows: That the control of the husband over the personal property of his wife, during coverture, is an important and well-established right; a right which he can not be deprived of, except by his own acts and agreements; and it is essential that he should do some act or make some agreement to part with the dominion or control of the property, which by law belongs to him. That the circumstances of the husband leaving the wife, or deserting her and contributing nothing to her support, do not entitle the jury to infer an agreement of the husband that the wife should enjoy the property in question to her separate use.

Bell and Tilghman, for plaintiff in error.

Dillingham and Chauncey, contra.

By Court, ROGERS, J. The testimony would have justified the jury in finding that Mary Starrett had been abandoned by her husband, Samuel Gibson. The fact of abandonment as being found by the jury, raises a question of some novelty, as well as of great importance to *femes-coverts*, whether property acquired during the time of the desertion, can be disposed of by the wife, by will, or otherwise. In other words, is property acquired under such circumstances separate estate, and, as such, subject to her disposition? It is conceded that the control of the husband over the personal property of the wife, during coverture, is an important privilege, and well-established right, of which he can not be deprived but by his own act or agreement. The acquisitions of the *feme-covert* inure to the benefit of the husband, as when a bond is given to the wife, he may sue alone. A gift or legacy to the wife, and even the rewards of her personal labor, during coverture, vest in the husband, and he may release them. As the law imposes the obligation of maintaining the wife and also endows her, it is but reasonable that he should have the advantages which arise from the relation of marriage. But although these are conceded as general principles, yet the exigencies of society, and experience, have introduced several exceptions.

Thus, when a husband is exile, his wife is permitted to sue in her own name: Co. Lit. 132, n. So, also, where the husband has abjured the realm, in such cases she is permitted to

claim her land without her husband, and is exempted from the disabilities of coverture. She may maintain trespass, may sue for her jointure, and may also be sued as a *feme-sole*. And, as in the case of *The Countess of Rutland against Rogers*, she may make a will, and may in all things act as a *feme-sole*, and as if her husband was dead, and this from the necessity of the case. These cases, which are put by way of example, show the great relaxation which has taken place from the rigidity of the ancient rules, which are relaxed from necessity, or where the reason of the rule has ceased to exist. The question then arises, when the husband has abandoned his wife, separated from her without affording her support, does his marital right still continue so as to give him an absolute property in her acquisitions. Unless some positive rule of law intervenes, policy and humanity would require that, as he has cut himself loose from the duties which the relation of marriage imposes, he shall not be allowed its advantages. His conduct would amount to a virtual surrender of his rights. Why should she not be permitted, by industry and management, to acquire property for herself and family? Why should she be liable to plunder, at the will and pleasure of a brutal and unfeeling husband, who, perhaps, has deserted her without cause, and returns for the purpose of seizing on her hard earnings? A husband goes off with an adulteress and continues absent for years; in the mean time, the wife, by industry and the assistance and compassion of friends, acquires property, and she disposes of it by will, which the husband endeavors to wrest from the objects of her bounty. Such cases have, and will again rise, and it should be an unbending principle of law, which would sanction such injustice. It is said that she may obtain a divorce; but why should we compel a woman, deserted by her husband, to sue for a divorce? Although abandoned, they do not always cease to cherish an affection for a worthless husband; besides, some wives are principled against divorces, nor should they be compelled, in order to avoid injustice, to resort to such a remedy. They are sometimes stimulated to exertion by a hope that the acquisition of property may be a means of reclaiming the husband, or, at least, in case of a subsequent union, of preventing ill treatment.

It is granted that a husband may, by express or implied agreements, renounce his marital rights, and vest property acquired by the wife as her separate property, and this where the husband is in strict performance of all his duties. Thus,

in *Slanning v. Style*, 3 P. Wms. 338, a husband voluntarily, and after marriage, allows his wife, for her separate use, to make profit of all butter, eggs, pigs, poultry and fruit, beyond what is used in the family, out of which the wife saves one hundred pounds, which the husband borrows, and dies, the court will allow this agreement to encourage the wife's frugality, and the wife shall come in as a creditor for the one hundred pounds. So also in *Calmedy v. Calmedy*, cited and approved of in *Slanning v. Style*, where the husband agreed that the wife should take two guineas of every tenant that renewed a lease with the husband, the fine which the husband received, this was allowed to be the wife's separate money. So also in *Magrath v. Roberts' administrators*, a wife may become a sole dealer or trader by permission of her husband, even without deeds, and she may become entitled to all her earnings, as her separate estate. But it is said that here there is neither an agreement express or implied. To which it may be answered, that it cannot be supposed that the husband intends his wife to starve; and as he has voluntarily withdrawn his support, it is a fair presumption that he has consented to her using her own exertions to maintain herself. But whether this be a strained presumption it is immaterial to inquire, as the court are of opinion that the desertion of the husband, and a cessation of his wonted duties, vest a separate property in the wife, in the acquisitions made during the time of the desertion. Nor does the opinion rest altogether on abstract reasoning. It has the benefit of an express decision, in which the principle we have been supporting is fully recognized: *Cecil and wife v. Juxon*, 1 Atk. 278. The defendant, Emanuel Juxon, some years after his marriage, left his wife and two small children, and went abroad, and did not see them for fourteen years. The wife's mother, during this time, intrusted her with millinery and other goods, and permitted her to maintain herself and children out of the profits. The husband, upon his return, breaks open the wife's house, and takes away all her goods and produce of the stock so lent as aforesaid. The bill was *inter alia* brought for the redelivery of the goods. The court decided that what the wife has acquired in her husband's absence to subsist herself and family, is her separate property, and is not liable to the disposition of the husband. Sir Joseph Jekyll, in delivering the opinion of the court, says that as the desertion of the plaintiff, Emanuel Juxon, was fully proved, the court would look upon anything acquired by the wife in his absence, for herself and

family to subsist upon, as her separate property, and not liable to the disposition of the husband, when he should please to come home and plunder her, and therefore declared that the plaintiff, Mary Juxon, was entitled to the goods that were in her possession, and also to the stock in her separate trade, before the same were taken away by the defendant, for her separate use.

Judgment reversed, and a *venire facias de novo* awarded.

CITED in *Martin v. Ives*, 17 S. & R. 364; *Estate of Wagner*, 2 Ash, 452; *Thorndell v. Morrison*, 1 Casey, 328.

KILHEFFER v. HERR.

[17 SERGEANT & RAWLE, 319.]

JUDGMENT—WHEN CONCLUSIVE.—Where a court of competent jurisdiction has adjudicated upon a particular matter, that matter is not open to inquiry in a subsequent action for the same cause, between the same parties, notwithstanding the defendant may have discovered new evidence not in his power at a former trial.

JUDGMENT—ESTOPPEL BY, WHEN WAIVED.—If a party, relying upon a judgment, fails to specially plead the same, in actions where judgments are required to be specially pleaded, the estoppel is waived, and the jury are not precluded from inquiring into the truth of the matter: so held in an action for maintaining a nuisance, where defendant pleaded a license, and plaintiff replied no license, instead of pleading a former judgment; but in actions of debt, assumpsit, etc., where special pleadings are not required, the former judgment is conclusive without being pleaded.

THE opinion states the case.

By Court, ROGERS, J. This is an action on the case for the continuance of a nuisance, to which the defendant has pleaded not guilty, license, and the statute of limitations. Replication, no license, *actio non accrevit infra sex annos*, issues, and rule for trial. To maintain the issue on his part, the plaintiff gave in evidence, among other things, the record of a suit in the common pleas of Lancaster county, to the April term, 1815, No. 308, *Christian Kilheffer v. Benjamin Herr*, in which the pleas were not guilty, license, and the act of limitations, issue, etc. There were the same parties, the same pleas, and, it appears most satisfactorily to the court, the same matter in controversy. The defense relied on in each case rested on an indenture between John Kilheffer and John Stoner, which contains a license for the erection of a dam, not exceeding the height of six feet seven inches, to be measured in the middle thereof from a cer-

tain rock, whereon the same now is, and stands erected and built. The location of this rock appears to have been the bone of contention in both suits. This defense, which in all probability would have availed the defendant, had the facts been known at the first trial, has been passed upon by the jury, who have negatived the defendant's plea by a general verdict for the plaintiff. The first question which presents itself is the conclusiveness of the record of the verdict in the first suit; and on this part of the case the court entertain no doubt. A verdict for the same cause of action between the same parties is conclusive, for when a court of competent jurisdiction has adjudicated directly upon a particular matter, the same point is not open to inquiry in a subsequent suit for the same cause, and between the same parties. It may be a great misfortune, as in this case, that from causes over which he had no control, the party may not have been properly prepared for trial. It is, however, a misfortune which this court can not remedy, as the rule is settled on the principle that there must be an end of litigation, and to provide against the loss of testimony, and as the defendant had an opportunity of showing the truth of the fact, he shall not afterwards be permitted to contradict a record to which he is a party. He is estopped to deny that which has been solemnly ruled against him. We shall, therefore, take it as settled that the erection of the dam complained of in the first suit is not open to inquiry in an action for the continuance of the nuisance. All the plaintiff was bound to do was to give in evidence the former recovery, to prove that the dam had undergone no alteration, but continued the same, and his right of action was complete. From a variety of cases, says Chief Justice De Grey, in delivering his celebrated judgment, in the case of the *Duchess of Kingston*,¹ relative to judgments being given in evidence in civil suits, it seems to follow as generally true that the judgment of a competent jurisdiction, directly upon the point, is as a plea in bar, or as evidence conclusive upon the same parties, upon the same matter directly in question in another court. The verdict must be considered as conclusive between the same parties in regard to the same matter, otherwise it would be, in effect, permitting one jury to review the decision of another. These principles are supported by the whole current of cases in England and in this country, as will be seen by reference to *Brockway v. Kinney*, 2 Johns. 210; *Rice*

1. 11 St. Trials, 261.

v. King, 7 Id. 26; *Platner v. Best*, 11 Id. 530; *Shelton v. Barbour*, 2 Wash. 64; *Preston v. Harvey*, 2 Hen. & Munf. 55.

In *Baxter and others v. The New England Insurance Company*, 6 Mass. 277, 286 [4 Am. Dec. 125], the law is summed up in this manner: "This proposition I think to be universally true that a person in all cases is concluded by a decree, sentence, or judgment of a court of competent and exclusive jurisdiction in a suit in which he was a party in all future trials of the same question, and whether that question arises directly or collaterally, provided there be no contract between the parties to the contrary. It is conclusive, not only of the right which it establishes, but of the fact which it directly decides." This was established and well known as a principle of English law at, and long previous to the revolution. The same principle was recognized in *Ross v. Heble*, 6 Serg. & R. 57. Indeed, the doctrine does not seem to have been questioned, as it appears to have been admitted that if the matter had been *res judicata* it could not be reheard. To apply these cases to the present, in the first suit, the point in contest was the license alleged by the defendant for the erection of the dam. This was passed upon, and directly decided, and the defendant now seeks a re-examination of that question, on the ground of new discovered testimony. It is said that this is an equitable defense, and that a court of chancery would, in such cases, afford relief to the defendant, and it would have been well if the counsel had shown some authority to sustain the position. The truth is, a court of chancery can not relieve against the law. They are as much bound by these principles as any other tribunal. Their jurisdiction is not an arbitrary jurisdiction, but is governed by precedent and adjudged cases; and however a chancellor may have lamented the misfortune of the defendant, in not having the necessary proof at the first trial, he could have afforded no relief. As soon as it was discovered that the matter was *res judicata*, he would have been equally bound as a court of common law. It is better that an individual should suffer than that the great land-marks of the law should be overturned. No prudent man would, I think, be willing to invest any judicial tribunal with so formidable a power. Thus in *Ex parte Goodwin*, 2 Vern. 696, a bankrupt having his certificate allowed, and having slipped his time of pleading it at law, to a debt precedent to the bankruptcy, is not to be relieved in equity. The chancellor says, a court of chancery is not to alter the law. Again, a court of equity is not to relieve either mispleading, or

where there is neglect, or want of plea, or no proper plea put in in time. It is in vain to talk of fraud. This does not come within that class of cases, but is the discovery of testimony which it was not in the power of the defendant to produce on the first trial.

Taking it then as proved, that a court of competent jurisdiction has adjudicated upon the very point in controversy, it remains next to inquire, whether the record of the former recovery be in this case conclusive evidence. It is admitted to be *prima facie*, but it is strenuously contended that the jury are not concluded from inquiring into the truth of the fact. In this part of the case, it becomes important to attend to the pleadings. The gravamen of the plaintiff's suit is said to be the continuance, and not the erection of the nuisance, and so far as damages are claimed, the position of the plaintiff's counsel is correct. It is impossible, however, to continue a nuisance unless a nuisance existed; and to maintain the plaintiff's action, the record of the former suit must have been given in evidence, or the plaintiff must here become nonsuit. The defendant's plea of license, I do not understand as extending only to the continuance, but is coextensive with the allegation in plaintiff's declaration, that there was a nuisance, which had been continued. It is impossible to separate the continuance of a nuisance from the original erection. The whole difficulty arises from our short mode of pleading. Had the defendant been called on to spread his plea on the record, it would, I take it for granted, have contained a statement of facts which were given in evidence to the jury. Had that been done, the plaintiff might have demurred, by which the whole matter would have been referred to the court, pleaded the former recovery, by way of estoppel, or have taken issue on the fact, license or no license. He has not thought proper to do so; but, as the defendant has pleaded generally a license, he has replied in the same manner, that there was no license. He has elected to refer the matter to the jury, and the question then is, whether the jury are precluded from inquiring into the truth of the case. If a party will not rely on estoppel when he may, but takes issue on the fact, the jury will not be bound by the estoppel, for they are sworn to find the truth of the fact. They can not, it is true, find against anything which the parties themselves have affirmed, or admitted on the record, for that would be going out of the issue, although such admission be contrary to the truth; but in other cases, though the parties be estopped to say the truth, the jury are not:

1 Salk. 276; Bull. N. P. 298. And of this the defendant can not complain, as instead of praying judgment of the court, whether the defendant ought to be admitted, or received to his plea of license, etc., contrary to the record, he takes issue on the fact of the existence of the license. The former verdict was powerful evidence to guide the jury, in the second suit, but that they were not absolutely bound by it, is apparent from adjudged cases in England, and in our sister states. Slight grounds would not justify the jury in disregarding the first finding, but we are to presume, that circumstances were shown, sufficient to warrant the second verdict, that a license had been given, to authorize the erection of the dam of the defendant.

These principles only apply where special pleading is required, for I grant, that where the parties are not bound to plead or reply, specially, the record of a former recovery is conclusive evidence, binding the plaintiff, the court and the jury, as in actions of assumpsit and debt. In such case the party has no choice and shall not be considered as having elected to have a reinvestigation of the facts. And this is the meaning of Chief Justice De Grey, when he says: "This is, as a plea in bar, and as evidence conclusive, between the same parties." In order to make the former recovery conclusive, it is necessary, where special pleading is required, that it be pleaded by way of estoppel. By this plea, he prays judgment of the court, whether the defendant ought to be admitted, or received to his plea of license, contrary to the record. Upon the same principle, says Phillips, in his *Treatise on Evidence*, page 223, it is presumed, a judgment will be as evidence conclusive between the same parties, in those cases where it can be given in evidence without being specially pleaded. The rule has been expressly declared, with reference to the judgments of courts of concurrent jurisdiction, and it seems to be equally applicable, in principle, to a former judgment of the same court. Thus, in an action of assumpsit, the defendant may either plead a judgment recovered, or give it in evidence, under the general issue; and it is difficult to assign a reason why the judgment should not have the same conclusive operation, if given in evidence without pleading, as it would be admitted to have, if pleaded in bar.

In Bull. N. P..298, it is stated the jury can not find anything against that which the parties have affirmed and admitted of record, though the truth be contrary; but in other cases, though the parties be estopped to say the truth, the jury are not; as in *Goddard's case*, where the bond was dated nine

months after the execution, and after the death of the obligor: 2 Co. 4, b. Thus Goddard, as administrator of James Newton, brought an action of debt against John Denton, upon a bond made to the intestate, bearing date the fourth of April: 24 Eliz. The defendant pleaded that the intestate died before the date of the bond, and so concluded that the said writing was not his deed, upon which they were at issue; the jury found specially, that the defendant did deliver it as his deed, the thirtieth of July: 23 Eliz.; and that the intestate was living the thirtieth of July, and that he died before the date of the bond; and prayed the advice of the court, whether this was the defendant's deed. And it was adjudged by Anderson, Chief Justice Windham, Perian and Walmesley, that it was his deed; and the reason of the judgment was, that although the obligee, in pleading, can not allege the delivery before the date, because he is estopped to take an averment against anything expressed in the deed, yet the jurors, who are sworn to say the truth, shall not be estopped; for an estoppel is to conclude them to say the truth; and therefore, jurors can not be estopped, because they are sworn to say the truth. In *Trevivan v. Lawrence*, 1 Salk. 276, the court held that not only the parties and all claiming under them, but the court and jury, were bound by an estoppel, and that the jury could not find against the estoppel; but the court took this distinction, which is immediately applicable to the question now under review, that where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may (which is this case), but takes issue on the fact, the jury shall not be bound by the estoppel, for they are to find the truth of the fact. Thus in debt for rent, on an indenture of lease, if the defendant plead *nil debet*, he can not give in evidence that the plaintiff had nothing in the tenement, because, if he had pleaded that specially, the plaintiff might have replied the indenture and estopped him; but, if the defendant plead *nihil habent*, and the plaintiff will not rely on the estoppel, but reply *habent*, etc., he waives the estoppel, and leaves it at large, and the jury shall find the truth, notwithstanding his indenture. And here let it be noticed that this case not only establishes the general principle, but the distinction taken, that the rule applies only where the defendant is bound to plead specially. When

he elects to go before the jury, he waives the estoppel and refers the truth of the fact of the license, to be determined by the jury at large. This doctrine, thus early recognized, has continued, and now is the law of England: 1 Starkie, 206. The same doctrine has been taken in our sister states, Kentucky and Connecticut; nor can I perceive that it has ever been infringed in any adjudged case: *Church v. Leavenworth*, 4 Day, 274; *Canaan v. Greenwood*, 1 Conn. 1; *Turnpike and Edwards v. McConnell*, Cooke's Rep. 205¹. The cases of *Shelton v. Barbour*, 2 Wash. 64; *Preston v. Harvey*, 2 Hen. & Munf. 55, turned on the conclusive nature of the judgment without reference to the pleadings. Their attention does not appear to have been drawn to this point, and however I may respect the opinion of these courts, I do not consider these cases as affecting this question. It will be seen that we do not entirely agree with Chief Justice Swift, in the case of *Church v. Leavenworth*, where he says, that verdicts are never conclusive, unless they are pleaded specially by way of estoppel. The rule must be taken with the qualification before stated. The cases on which he relies do not, I conceive, support the positions in the broad manner laid down, as, I apprehend, could be easily shown, were the cases open to examination. I, however, must cheerfully concur with him in the opinion, that we may as well question any other principle of the common law as this. If the ground is to be taken, that because we doubt the reason or propriety of an established rule, we are at liberty to reject it, and substitute another for it, then all principles are again thrown afloat on the ocean of uncertainty, without any compass but the discretion of the judge.

The foundation of the law is not laid on such a fluctuating basis. It has been pronounced, by the greatest jurists, to be the perfection of reason, not of every man's natural reason, but an artificial perfection of reason, gathered by long study, observation, and experience: Co. Lit. 97, b.

Two other bills of exceptions have been pressed upon the attention of the court. The first is the declaration of Godfrey Blythe, which becomes evidence, in consequence of the presence and assent of the plaintiff.

The second we consider as the ascertainment of a fact, which can be done without the presence of the parties. Although Kilheffer may not have been within earshot at the time, yet he, with others, had gone there for the purpose of ascertaining the mark, and the admeasurement of the height of the dam from

1. *Edwards v. McConnell*, Cooke's Tenn. 305.

that mark. His accidental, or intentional absence, is no reason for rejecting the testimony. It is the opinion of the court that the judgment be affirmed.

HUSTON, J. The question how far, and in what cases, a trial and judgment, in a court of competent jurisdiction, is conclusive of the same matter, coming directly or incidentally before another court, and not by appeal or writ of error, is one of general consequence. The law seems not to be disputed, but under what circumstances it will avail a party has become a question. In England, before the year 1776, and long after in New York, Massachusetts, Virginia, Pennsylvania, and in the supreme court of the United States, it is held to be equally available, whether pleaded in bar, or given in evidence, where the rules of law permit it, under the general issue, as in *assumpsit* and in *ejectment*; but in some late elementary writers we find it laid down on the authority of a distinguished English judge, who has introduced more changes into Westminster Hall than any other ancient or modern judge, that it is only available when pleaded as an estoppel. On full consideration, I incline to the opinion that this latter change is not an improvement, but an error. It seems to be supported, first, by the cases which say that a jury is not bound by an estoppel; and, secondly, which say that a court of equity is not.

An estoppel is always something personal — the party is estopped from recovering his claim, on proving his defense, by some act in law, or in deed, or *in pais*, which precludes him from going beyond it and proving all the case. It always arises from the act of the party estopped by it; but if the opponent, instead of relying on this act, will go beyond it, and put the cause at issue on other, and especially anterior facts, the estoppel, being waived by him who had a right to avail himself of it, ceases to operate. For example, a man sues in debt for rent on an indenture, the defendant pleads that the plaintiff had no title to, nor possession of, the premises demised; if the plaintiff, instead of relying on the indenture, which in law estops the defendant, will reply, and go to issue and trial on the facts pleaded by the defendant, the jury, who are always to try the facts in issue, are not estopped by an indenture, not relied on by the plaintiff, from finding the truth.

So, in equity, a suit is brought at law on a bond executed by three, and judgment obtained; on application to chancery, stating that at an execution of the bond, it was expressly agreed that each obligor should only be liable for one third, and that

the defendants being estopped by their deed from availing themselves of this agreement at law, the plaintiffs had issued execution, and levied the whole on the goods of one, equity will grant an injunction and stay of execution against any one on his paying in one third of the debt, interest, and costs; because the plaintiff is using, against justice and conscience, a judgment fairly obtained, and equity is not bound by the estoppel arising from the act of the obligors, in sealing the deed.

But a former trial, verdict, and judgment is not the act of the party, but of the tribunal which decided it, and to call it an estoppel is a misapplication of terms; it has not the distinguishing mark of an estoppel; it is not the consequence of some act of the party bound by it; it is a bar to future recovery in any court, on the same point, between the same parties, or privies, until reversed on appeal, or writ of error; and it is as much a bar in chancery, where an attempt is made to re-examine a matter once decided at law, as it is in a court of law; it is as much a bar in actions where we can not plead specially, as ejectment, as in any other action, and as much a bar in an inferior tribunal where there are no pleadings, as in one where the pleadings are, or may be, drawn out at length. Such are my impressions on this point, believing that the courts, in this and the other states, and the supreme court of the United States, have put the matter on its true ground, viz., that the order and peace of society, the structure of our judiciary system, and the principles of our government, are the true grounds why such a judgment is conclusive. I am not willing to leave this ground and rest it on the narrow and inapplicable one of estoppel. I also incline to the opinion that even on a plea of a former trial, on the same point, etc., the issue is always to the country; for although it is pleaded with a *profert prout patet per recordum*, yet the plea must go on, and put in issue, whether the parties are the same, the point the same, etc., and if plea does not do so, the replication may put these matters in issue, and thus there will be no bar arising from a former decision.

There are, however, cases in which it may not be possible that this, whether pleaded or given in evidence, will apply, as in a suit for continuing a nuisance of the kind now considered. The former verdict and judgment may have proceeded on the ground that the license was void; but we can hardly suppose this, and, in fact, this was not the issue, which, if license had been set out, and plea found, would have been that the dam was not raised more than six feet seven inches. The former verdict and judg-

ment will be conclusive that it then was; but in this suit for a continuance, perhaps, instead of relying on vague testimony that the dam was continued from 1815 to 1820, at nuisance height, the true course would be for the jury to ascertain that it, in 1820, was or was not higher than six feet seven inches clear of the rock; and if it was, find for the plaintiff, if not, for the defendant. I say this was perhaps the true course; for as the issue was not made up at length, we can not tell whether that verdict was given on the ground that there was no license, or on the ground that the defendant had exceeded the height allowed by his deed. Whatever may be made certain by the record ought to appear on the record; but where that can not be, as in ejectment, it may, nay must, be made out by parol; as the plaintiff in this case might have had, on the record, the very point on which the former trial turned, and did not. I think the judge was not wrong in permitting the evidence to go to the jury.

The other points I am not disposed to reverse for. In such a case, the previous testimony must have so much effect in determining whether a particular act or declaration of a party is to be admitted or rejected, that without it we can not form a correct opinion. Generally, when men claim together by some contract, and are together in discussing it with an opponent, the declarations of one, in presence of the other, are evidence against that other; but where a trespass against one is also, in some respects, alleged to be a trespass against another, it would not be universally true, that the declaration of one trespassed on would be evidence to affect the other, though he was present and heard the expressions, and did not dissent; nor would it be universally true in all cases, that expressions in such circumstances must be rejected by the court. Something arises in almost every trial, some expressions are used by many witnesses, not legal evidence; and it often happens, that in the course of a trial, evidence comes out, which, if known before, would have induced the judge to reject part of what had been previously received. The court will and do explain this to the jury, and it seldom does any harm. I would not agree to reverse for any such hair-breadth mistakes.

I agree the judgment should be affirmed, but have thought the first point of sufficient importance to express my opinion on it.

Judgment affirmed.

CITED in *Marsh v. Pier*, 4 R. 288, and that case held to be within the exception stated in the principal case. In *Long v. Long*, 5 Watts, 102, that a

judgment in an action of nuisance must be pleaded. Cited as to conclusiveness of judgment in subsequent proceedings, in *Mass v. Drexel*, 2 Pa. St. 211; *Walton v. Dickerson*, 7 Id. 378; *Finley v. Hanbest*, 30 Id. 194; *Lewis v. Neazel*, 38 Id. 225; *Wickersham v. Savage*, 58 Id. 369.

JUDGMENTS—WHEN FINAL.—See *Le Guen v. Gouverneur*, 1 Am. Dec. 121.

MASSER v. STRICKLAND.

[17 SERGEANT & RAWLE, 354.]

SURETIES—BOUND BY JUDGMENT AGAINST PRINCIPAL, WHEN.—A judgment against a constable for official misconduct is conclusive upon his sureties as to such misconduct, and the extent of damages sustained by the plaintiff; but they may assert any defense personal to themselves.

WRIT of error to Northumberland county. *Scire facias* against defendants (plaintiffs in error) as bail of one Richardson, formerly a constable.

The opinion states the case.

Greenough, for plaintiffs in error.

Frick, contra.

By Court, HUSTON, J. The defendant in error, who was plaintiff below, had brought a suit in the year 1818, before — Martin, Esq., against Andrew Row, on which he obtained judgment, and on the thirtieth of September, 1818, issued execution, which was put into the hands of Joseph Richardson, constable of the proper township. The money not being paid, Strickland had a *scire facias* issued against Richardson for neglect of duty; and on trial before the justice obtained judgment against him on the twenty-first of September, 1821, for thirty-five dollars and forty-one cents, and one dollar and six cents costs. Execution issued thereon, and Richardson was arrested, having no goods or lands, was imprisoned, and soon after discharged under the laws for relief of insolvent debtors.

Richardson, when appointed constable, had given bail, and Masser, Gobin, Painter, and Haas were the bail. Strickland then, under the act of assembly, proceeded by *scire facias* against them; the cause was carried to the common pleas by appeal. At the trial in court, the plaintiff offered in evidence the record of the justice of the trial before him against the constable, the execution and arrest and discharge as an insolvent debtor. This was objected to, but admitted, and exception taken. This exception has not been insisted on in this court; it is an instance of the practice, too common in some parts of

this state, of delaying the cause, and incumbering the record with a bill of exceptions to every particle of evidence given on each side. The evidence was not only proper but strictly legal in its nature, and necessary in the cause, and expressly required and directed by the act of assembly hereafter cited.

The defendants then offered to go into evidence to prove that, in fact, the constable, Richardson, whose bail they were, had not been guilty of any neglect or misconduct, but had proceeded strictly according to the directions of Strickland, the plaintiff. This testimony, on objection to it, was overruled by the court. "We will not," say the court, "inquire into the validity of the judgment before the justice against the constable, who might have taken his appeal or *certiorari* to that judgment. The judgment we consider valid until legally reversed."

The defendants then gave no testimony, and the court told the jury: "We are of opinion the plaintiff is entitled to recover the amount of his judgment against the constable for neglect of duty, against the defendants, his bail; the judgment against the constable remaining unappealed from and unreversed." The rejection of this evidence, and the opinion as to the effect of the judgment against the constable, in this cause, were the errors relied on here.

I shall consider the matter as it would be, independent of our act of assembly, and as it is under the act. There are many cases in our books relating to the question, in what cases a judgment shall be binding on those not parties to it on the record; and to what extent and in what respects it shall be binding; and it would require some time, and not a little reflection, to bring them all within any rule or rules.

I shall not go into the general question, or pretend to cite or reconcile all the cases. Perhaps we do not find in the books any cases where the situation of the parties is precisely the same with that of sureties for officers under our acts of assembly; and there is also some difference in the nature and extent of the liability to which the bail of different officers are subjected; and also some difference in the remedy, the form of action, and the proof which may, or must, be adduced to obtain redress for those aggrieved.

These bonds have been likened to covenants of warranty, and cases are cited to show where the record of the eviction of the person warranted is evidence, and how it is evidence against the warrantor, who had not had notice, or who has notice of

the suit, and been called on to defend it. In most cases it is necessary to prove an eviction, in order to support a suit on the warranty, and in such cases the record of eviction is always evidence, and evidence of the utmost importance. For the purpose of proving the fact that the person had been evicted, it is always evidence. How far any additional efficacy is given to it by proof of notice to the warrantor, or in what cases, or whether in any case, except where obtained *per fraudem*, it is liable to be questioned, I shall not stop to examine.

These bonds have also been compared to bonds of indemnity, to which, perhaps, they have a nearer resemblance. In these there is no need, except, perhaps, for the purpose of recovering the costs and expenses of the suit against the person indemnified, to give notice. The record of a suit, and verdict and judgment against the person indemnified, is evidence both of the fact of damage and the extent of it, in a suit on a bond of indemnity, whether notice was given and the party called on to defend it or not: 1 Saund. 116, and notes. Those who have undertaken to save a man harmless are considered as bound to take notice of any suit against him, or perhaps as contracting to take notice, or as contracting expressly to save harmless, whether they have notice or not, and as agreeing to trust to the person indemnified the management of the defense, if suit is brought against him. A bond nearly of this nature was considered similar to a bond of indemnity, in 6 Johns. 158, where it is intimated that the doctrine of *res inter alios acta* does not apply to the case of the principal and surety. In that case, however, notice had been given, and the decision was that the judgment was conclusive that the plaintiff had been damnified, and of the extent of damages. The matter was considered again: 7 Johns. 168. In that case, also, notice had been given of the suit against the sheriff, and the defendant had co-operated in the defense, and the decision was held conclusive of the damages, and of the amount thereof. I apprehend, however, from the reasoning of Chief Justice Kent, page 171, that the decision must have been the same if no notice of the former suit had been given to the defendants in the cause trying. His case did not call for an opinion on this point, but the principle cited above from Saunders, 116, and the case 6 Johns. 158, and the case in 7 Johns., all led to the conclusion that, either from the relation and engagements of the parties, or from privity, the judgment against the officer would, unless obtained by fraud, have been conclusive of the officer's liability and of the extent of it.

These official bonds are always joint and several. If the officer is sued first, and a judgment obtained against him, and on failure of obtaining satisfaction, suits are brought against the sureties, I apprehend judgment could not be obtained for a larger sum against them than had been recovered against the officer. The verdict and judgment against him might be used by them to limit the extent of the plaintiff's claims; if it could not, the case of sureties would be alarming. The plaintiff's demand, as shown by his execution, may be large. The sheriff alone can show how much of the defendant's goods he found; whether those goods were in whole or in part subject to claims for rent, or to prior levies on other executions, in the hands of the same or a different officer. If any money were paid the plaintiff, this, and the evidence of it, must be peculiarly within the knowledge of the sheriff. A judgment against him for a small sum must, then, protect his sureties from paying a much larger, and if the judgment is evidence to protect them it must be evidence against them; not conclusive in all respects, for they may plead *non est factum* to the bond, a release, the statute of limitations, etc., but conclusive either for or against them of the fact that the officer has not performed his duty, and of the damage for which he and his bail are liable. I am aware that the case of *Camack and others v. The Commonwealth*, 5 Binn. 184,¹ may be cited as containing a contrary opinion, and I know that the decision in this case lay over on account of that. But without going into a minute investigation of that case, or showing in what respects it differs from this, I may say the opinion and reasoning above may be left for consideration, when a case on a sheriff's bond occurs. This is on a bond against a constable's sureties, and we decide this case on the law as applying to such bond.

By the twenty-ninth section of the act of the twentieth of March, 1810, it is provided that when a constable elect is not possessed of a freehold estate, clear of all incumbrances, worth one thousand dollars, "he shall, before being appointed, be bound in an obligation to that amount, with at least one sufficient security, to be taken, etc., for the just and faithful discharge of said office; and such obligation shall be held in trust for the use and benefit of all persons who may sustain injury from him in his official capacity, by reason of neglect of duty, and for like purposes and uses as sheriffs' bonds are usually given."

1. *Camack v. Commonwealth*, 5 Binn. 184.

The proceedings for redress by the party aggrieved are very different from those directed on the sheriff's bond. By section nineteenth it is provided that "any constable who has, or may hereafter give security agreeably to law for the faithful performance of the duties of his office, and afterwards, on neglecting or refusing to perform such duties, shall have judgment rendered against him for such neglect or refusal, and on being prosecuted for the recovery of such judgment, becomes insolvent, abandons his country, or from any other reason it becomes impracticable to recover such judgment from such constable, or when a constable makes default, and abandons his country before judgment had against him, the justices before whom such judgment or judgments stand unpaid, are hereby authorized to issue a *scire facias*, and to proceed against such bail, for the recovery of judgments had as aforesaid, in the manner constables are now suable, saving only the right of appeal to such bail." Now, the bail of a sheriff may be sued in the same writ with him or separately, and judgment and recovery against them, or one of them, before any judgment against the sheriff. The bail of a constable are not suable, unless where he has absconded, until suit has been brought against the constable, and judgment obtained, and he is pursued to insolvency; and then not suable before the justice, though it has been held they may be in court by action of debt; but by *scire facias* on the judgment already obtained before the same justice against the constable. It is against all principle and all precedent to permit a party to plead to a *scire facias* on a judgment, what had been, or might have been pleaded to the original judgment. When these men entered into this bond, they were bound to know the extent of their liability and the remedies against them. They have entered into it, have incurred the risk, and must submit to the consequence. Where the law is positive, it is in vain to talk of hardships. But I see none. This construction is more in favor of bail generally than that contended for. If the judgment against the constable is erroneous or unjust, an appeal can be entered. The bail are not strangers to such judgment; they are bound for all the official conduct of their principal, and bound to attend to proceedings against him by their bond, and by the law, and if they were not bound by the judgment against the constable, neither would the plaintiff be; and after the constable, who alone knew of the defense, had absconded, the plaintiff might recover from them the whole amount of his debt, who had only recovered a small sum in a suit against the constable.

The judgment against the constable is, however, only conclusive of the misconduct of the constable and injury of the plaintiff; it is not absolutely conclusive against the bail; they may plead any defense personal to themselves, or anything to show that at the time the constable was liable they were not. As nothing of this kind was offered, the judge was right as to the evidence, and right in his direction to the jury.

GIBSON, C. J. If the sureties are concluded by the judgment against the constable, it must be for reasons purely technical; for it assuredly will not advance the justice of the cause, to refuse them an opportunity to make their defense in this action, since they could not of right, and did not in fact, make defense to the *scire facias* against the constable.

In matters of private right, a judgment is evidence only against parties and privies. The defendants were clearly not parties. A court will undoubtedly look beyond the record, and treat as parties all who are found to have in fact acted a part, and this whether their interference were irregular or not. Yet, except in particular cases, no one will be forced to become a party, indirectly, who could not be brought in directly; and even in the excepted cases, he must have had notice to defend. Here notice is not pretended; and had it in fact been given, the sureties would not have been bound to respect it. The notice to defend is derived by analogy from the voucher to warranty, and came into use with the personal action of covenant, when it superseded both the voucher and the ancient *warrantia chartæ*; and like the voucher, its object is a recovery over against the warrantor, with whom none but the party against whom the recovery has been had, has to do. Such a notice, therefore, can be given, not by the plaintiff, but the party to be defended. Here the sureties were under no obligation to the constable, much less to the plaintiff, to defend against the *scire facias*. They were, therefore, not parties immediately or remotely; and it remains to be seen whether they stand in such privity as to be affected.

Lord Coke enumerates several sorts of privies, and among the rest, privies in contracts: 3 Rep. 23; 4 Rep. 123. But a recovery operates by way of estoppel, and none are to be estopped except privies in blood, privies in estate, and privies in law. The best elementary writers lay down the rule in the same words: 1 Stark Ev., part 1, 192; 1 Phil. Ev. 245. Here privity of blood or estate is out of the question, and privity of law is spoken

of as contradistinguished from privity in deed; as where the law implies the relation without its being created by deed; for example, in escheat: Jacob's Dict., tit. Privies. But the relation between these parties, which at most is that of principal and surety, is created directly by deed; and if there be any privity between them, it is that of contract, which is not admitted to be sufficient by any court or authority whatever. In *Patton v. Caldwell*, 1 Dall. 419, a special verdict in another action on the same policy was held to be admissible only because all the underwriters had made the action their own by agreeing to be bound by the same verdict. This is in principle exactly our case. The underwriters had separately covenanted for the happening of the same contingency; and, in our case, the defendants and the constable had separately covenanted for the due execution of the constable's office, just as they might covenant for the happening of any other distinct and independent fact. In other words, the constable and his sureties, like the several underwriters, were bound for the same thing, but by distinct obligations. How, then, shall the covenant of the surety which is never to be stretched beyond the letter, be extended to the payment of whatever may be recovered from the principal? It is, indeed, said by Pothier, whose authority is relied on in *Kip v. Brigham*, 6 Johns. 158, that the case of principal and surety does not fall within the rule of *res inter alios acta*. And so, indeed, are the provisions of the French or civil law, according to which the surety accedes to, and becomes bound immediately by the contract of the principal, the contract of the surety being merely an accessory of that of the principal, and the former taking the place of the latter for every purpose of responsibility; whether actual or contingent: *Traité des Obligations*, part 2, c. 6; sec. 1. But will any one say that such are the provisions of the common law; according to which, the surety is bound by the terms of his own engagement, without regard to the stipulations of his principal.

The case of *Camack v. The Commonwealth*,¹ 5 Binn. 184, is directly in point. There, the principal and the sureties were sued on their bond jointly; and it was not necessary to show that the plaintiff had previously done all in his power to obtain satisfaction of the principal; these two are the only points of difference on which a distinction could possibly be attempted. But that the principal and sureties are sued together certainly does not weaken the relation in which they stand by their

1. *Camack v. Commonwealth*.

contract. Then, that the act of assembly in cases like the present requires the principal to have been first pursued, has the effect only of making the recovery evidence against the sureties, not of the facts adjudicated, but of the requisitions of the law having been complied with, of which the record of the recovery is the best, and consequently the only competent evidence. Of this I shall speak more fully in noticing the exceptions to the rule which requires privity. These unessential grounds of difference being removed, *Carmack v. The Commonwealth* comes fully up to the point, and is decisive of the principle in the abstract, that the rule of *res inter alios acta* is, in fact, applicable to the case of principal and surety. Notwithstanding a recovery against the principal, the sureties were let in to traverse the cause of action *ab origine*.

The cases which appear to be exceptions, constitute, in fact, a distinct class, and are regulated by principles peculiar to themselves. This rule, which requires privity, is inapplicable to them, because, as it is expressed in *Gratz v. Burr*, 4 Wheat. 213, the judgment is admitted, not as binding the right of the party against whom it is produced, but as a link in the title; in other words, as operating not by way of estoppel in respect of any fact adjudicated, but as being itself an independent fact, and an ingredient in the cause of action or case set up by him producing it. There can be no happier instance of the difference between the cases of this class and those of which I have spoken than the case before us. By the act of assembly, recourse can be had to the sureties only after every means of obtaining satisfaction from the principal has been exhausted; and the judgment is consequently evidence against his sureties to show that he has been pursued. But because it is evidence in that respect, it by no means follows that it should be evidence of the facts adjudicated, so as to fix the sureties with the consequences of his delinquency.

The common instance of a verdict against a master for the misconduct of his servant is also apposite for the purpose of illustration. The misconduct of the servant, which must first of all be proved by evidence *aliunde*, makes him answerable for all the mischief it may occasion. But the injury which the master has suffered is not to be estimated by what might be supposed an adequate compensation of the party who suffered in the first instance, but what the master has, in consequence, been compelled to pay. So that the verdict against the master is evidence against the servant to fix the *quantum* of the damages. The ser-

vant can not object that less might have been recovered if he had been permitted to defend and cross-examine the witnesses. His misconduct reduced the master to the necessity of defending himself in the best way he could; and if, in consequence, a loss must be borne by one, it shall be by him whose act occasioned it. In that case, as in this, the amount of the loss actually suffered is the measure of the damages. But how unlike are the two cases in every other respect! The damages recovered from the master necessarily constitute the actual injury which he has suffered, and form the standard of his compensation; but the amount recovered from the constable is not necessarily in exact accordance with the extent of the injury. But the case of the servant would furnish a satisfactory analogy in an action by the sureties against the constable; in which a recovery by the plaintiff from the sureties would be decisive of the *quantum* of the damages, and provided notice had been given to the constable to defend, conclusive of the facts adjudicated. Thus, also, it is in actions on contracts of indemnity, where the loss to be compensated has been produced by an adverse recovery; as in the case of special bail who have undertaken to surrender the principal or pay the condemnation money; or in an action on a warranty, which is broken by the very fact of a recovery on an adverse title. On this principle is *Bender v. Fromberger*, 4 Dall. 436; *Leather v. Poullney*, 4 Binn. 356, and the cases cited from the New York reports. Had the sureties, like special bail, covenanted to pay whatever should be recovered against the constable, the plaintiff would have made out his case by producing the judgment, which, under the terms of the contract, would have been conclusive. But they covenanted only for the due performance of the constable's office; and it seems to me they ought not to be precluded by anything which has passed between the plaintiff and the constable, to whom they gave no authority to bind them, from showing that their covenant has been performed.

Smith, J., did not hear the argument, and took no part.

Judgment affirmed.

Affirmed in *Eagles v. Kern*, 5 Whart. 145; *Evans v. The Commonwealth*, 7 Watts, 399; *Musselman v. The Commonwealth*, 7 Pa. St. 241; *McMicken v. Commonwealth*, 58 Id. 221; *Giltman v. Strong*, 64 Id. 247; *The Commonwealth v. Smith*, 4 Phila. 51, on the point that the judgment against the principal is conclusive on the sureties.

CONFESSIONS OF PRINCIPAL, when evidence against surety, see *Republics v. Davis*, 2 Am. Dec. 366.

HEPBURN v. McDOWELL.

[17 SERGEANT & RAWLE, 383.]

LICENSE—WHEN TERMINATED.—A license to erect a dam for temporary purposes, ends by the decay of the dam, and will not authorize the erection of another dam in its place.

NOTICE.—A person who sees another erecting a dam, by which he will be injured, is not bound to give him notice, if the latter knows what his rights are and obstinately proceeds in the assertion of them.

NOTICE to one, of two or more persons, engaged in a joint act, is notice to all.

APPEAL from the Circuit Court of Columbia County. The opinion states the case.

By Court, ROGERS, J. In awarding a new trial, the court think proper to lay down some principles which may be useful in another trial of the cause. It appeared, in evidence, that Frederick Ritter, under whom the plaintiff claims, was in possession of the Jew's mill from 1811 till 1815. The spring he came there was no dam, but in the summer of that year, Drake, under whom the defendants claim, drove, and put in some stakes and bushes and made a dam, as the witness says, like a fish dam. It was swept away in a short time by a freshet. Drake then asked Ritter if he would help him to make a little dam, with which Ritter complied, by assisting him to get logs, and to lay them across the creek, to cut bushes, and to lay them on the logs, and that then Drake hauled stones on the top of the bushes. Ritter cannot say that the dam was ever finished but believes that it stood that winter, but was gone the next. He says he did not take particular notice how high it came, for he did not care much about it, as it did not injure him, and that he never gave Drake any right to overflow the ford. He was sure the dam he made would not stand long. That he gave Drake no grant of the right, and that there was a saw-mill on the property at the time. This permission, or license, has been attempted to be magnified into a grant of a right to erect a dam of a permanent nature for a grist mill, of the same height, which it is alleged was twenty inches. As a license for the erection of the present dam, the assistance, or permission of Drake, as disclosed by the evidence, is entitled to no weight. It was a license for a temporary purpose, which appears to have been answered, which would have excused Drake from a suit by Ritter, but does not amount to a grant for any other purpose than was in the immediate contemplation of the parties. It is

manifest it was neighborly kindness on the part of Ritter, without the slightest view of granting a right to a permanent use of the water. To make the most of it, it was a license during the continuance of the dam, and as soon as the dam was swept away, the license ceased to exist. To justify a new erection, even for a temporary purpose, a new grant or permission was necessary. I mean if the effect was to swell the water on the land of Ritter. In *Rerick v. Kerr*,¹ the distinction is taken between the cases, where the object to be accomplished is temporary, and where it is permanent. Permission to use water for a mill, or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation. But it is otherwise where the object to be accomplished is temporary. And the court then instance a saw-mill as a temporary erection, 14 Serg. & Rawle, 267 [16 Am. Dec. 497]. No person can avoid seeing that it was not within the comprehension of either of the parties, that Ritter had made a grant to Drake of a right to a permanent use of the water. It was a temporary use that was intended to be conferred, and for a particular purpose, and it would be the height of injustice to extend that to any other purpose than that intended by them. On the trial it was contended: first, that James Hepburn was bound to give McDowell notice, and that the notice which was given was insufficient. If McDowell stood in the situation of a man totally uninformed and ignorant of his rights, it would be the duty of Hepburn to put him on his guard. He, however, was acquainted or ought to have been, with his own and his neighbor's lines, and was well aware, or ought to have been, with the effect of the dam. He, at least, was as well acquainted with those matters as Hepburn could be. He acts then at his own peril, and if under such circumstances he swells on his neighbor, he must answer for the consequences. Notice is required to a man who acts *bona fide*, not to him who willfully and obstinately persists in using that to which he has no title, or pretense of title, without giving or offering compensation for its use.

It may be asked, why give McDowell notice? Was he ignorant of his own or his neighbor's lines, or the effect which his dam would produce? That is not pretended; or, if he was ignorant, it was because he would not take ordinary pains to inform himself. It was his duty to obtain the necessary in-

1. *Rerick v. Kerr*, 14 Serg. & Rawle, 267 [16 Am. Dec. 497].

formation, and as a just man, he should have obtained the permission of Hepburn to swell the water beyond his lines. It is, in the opinion of the court, no answer to say that Fishing creek was a public highway, and that the injury done to Hepburn was trifling; and to apply the maxim, *de minimis non curat lex*. He has swelled, for his own purpose, and to his great advantage, on the soil of his neighbor; and there is that special damage which the law contemplates. It, in its consequences, lessens the value of Hepburn's mill, and without determining the point, it may be matter well worthy of inquiry, whether the measure of damages be not the benefit derived from the erection to McDowell, rather than the special damages of the plaintiff. Although Fishing creek be a public highway, it is an easement merely; the right of soil remains in the owners of the adjoining property. But, even if notice was necessary, and it would be strange if a man was bound to give another notice not to violate the law, the plaintiff has done all that was required. Hepburn gave a power of attorney to Hopkins for the special purpose. Hopkins informs us he went three times, and could not find them. He then went to Andrew Shreiner, who was McDowell's contractor, and gave him notice not to build the dam. Shreiner said he cared nothing about it, that McDowell and Milland were bound to indemnify him, and he would go on and put up the dam. If notice be necessary to persons who are engaged in a work with a full knowledge, or who may have knowledge that it will prove a nuisance, notice to one is notice to all. They are engaged in a joint act, the consequences are visited on all, they are affected by the acts of all; and even if Shreiner should have omitted to inform McDowell and Milland, which is highly improbable, it would make no difference. Hepburn, by his attorney, has done all the law requires, and shall not be answerable for the omissions of McDowell's and Milland's contractor.

New trial awarded.

CITED in *Carr v. Wallace*, 7 Watts, 301, and in *Miller v. Cresson*, 5 W. & S. 302, on the ground that a person who permits another to spend money on his land without making known his claim, is estopped from subsequently asserting it as against such person. Also in *Hill v. Epley*, 31 Pa. St. 334; *Kay v. Pa. R. Co.*, 65 Id. 273. Cited in *Commonwealth v. Moltz*, 10 Id. 531, on the point, that if a person is ignorant of his claim, he is not estopped: See *Kreiser's Appeal*, 69 Id. 200; *Morrison v. Caldwell*, 17 Am. Dec. 84.

LICENSE.—Rights acquired by parol. See note to *Ricker v. Kelly*, 10 Am. Dec. 40, for a full statement of the law on this subject.

GRAY v. HOLDSHIP.

[17 SERGEANT & RAWLE, 413.]

FIXTURES—WHAT ARE.—A copper kettle or boiler in a brewhouse is part of the freehold, and subject to the mechanics' lien law.

APPEAL from a judgment of the circuit court of Allegheny county. **Assumpsit.** The opinion states the case.

Burke and Selden, for plaintiff in error.

Fetterman and Baldwin, contra.

By Court, SMITH, J. The declaration is in assumpsit, and contains the usual money counts, with a special count for the use and occupation of two houses in Pitt township, and for the use of a copper boiler in a brewery. The cause was tried at the last circuit court for this county, on the thirtieth of August, 1828, before Justice Huston, when a verdict and judgment were rendered for the defendant. A motion for a new trial being made and overruled, the plaintiff thereupon appealed.

It appeared in evidence that in the year 1822, a Mr. Grenough had issued a landlord's warrant for arrears of ground rent due from certain premises, situate in Pitt township, on which there were several buildings, at that time occupied as a brewery. Under this warrant, the bailiff of Grenough levied on a brew-kettle, or copper boiler, set up in the brewery, and fixed in its proper place. The bailiff loosened it, and took it out of its place, and moved it to the door of the brewery, out of which it could not be taken. The representatives of Robert Graham, deceased, holding the premises under a certain deed (called, and well understood here, by the name of a perpetual lease), had rented them to Andrew Scott, who, at the time of Grenough's warrant, was in possession. The administrator having borrowed two hundred dollars from James Gray, the plaintiff, with that money paid the rent aforesaid, and redeemed the brew-kettle, pledging it to James Gray for the money so borrowed, and agreeing that it should be his if the same were not refunded within sixty days. The money was not repaid, and both the administrator and the plaintiff regarded the kettle, after the expiration of the sixty days, as the property of the latter. The plaintiff accordingly hired it to Scott, who agreed to pay him for its use. It was also proved that the first building on the premises had been erected many years ago, and used for a distillery; that an addition was built in 1816 or 1817, and that the brew-kettle in controversy was manu-

factured and fixed in the additional building in the year 1819, for a brewery. It was further proved that the business of brewing could not be carried on without a brew-kettle or boiler, and is so essential, indeed, that a brewery would be worth nothing without one.

On the tenth of May, 1820, Henry Holdship, the defendant, filed a mechanics' lien against the former owners, Caldwell & Co., upon the premises in question, for three thousand dollars, issued a *scire facias* thereon, and obtained judgment for one thousand eight hundred and seventy-three dollars and eighty-five cents, on which a *fieri facias* was levied on the property where the brewery stood, with the appurtenances. The property was condemned, sold, and bought by Henry Holdship, who claims the copper kettle or boiler, the value of which is the object of this suit.

Although the plaintiff assigned four reasons for a new trial, two questions only have been raised on the argument, and need be considered in deciding the case. The first is, was the brew-kettle a fixture annexed to the freehold, and so real estate; or was it merely personal property? In the time of Lord Coke, the general rule was that whatever was once annexed to the freehold became part thereof, and could not be afterwards separated, but by him who was entitled to the inheritance. To have taken it away would have been waste in any other person. Indeed, the law is thus laid down in all the old, and recognized to have been so in the more modern cases. This rule, however, has been relaxed, especially in cases between landlord and tenant, and is made more favorable to the latter. Where a man, for instance, rents a house, a mill, or a shop, and for his own convenience puts stoves in the house, or a packing press, or elevators in the mill, or a crane and pulley, or other like thing in the shop, the tenant may remove any of the articles thus put up for his own convenience or advantage. This I consider well settled. As to the full extent of the rule in its application to the various classes of cases and persons, it is unnecessary to give an opinion.

From the adjudged cases on the subject, I think we are warranted in saying that everything put into, and forming part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is part of the freehold; the wheels of a mill, the stones and even the bolting cloth, are parts of the mill and of the freehold, and can not be levied on as personal property. If the law were otherwise, it would produce great

hardships, and manifest injustice; for if I should devise my mill to one of my children, and give all my personal property to another, would any one dream that the wheels, stones, and cloths of the mill could justly be taken by my executors, and sold as personal property? But, admitting the law to be so, it is nevertheless contended that this copper kettle or boiler is not a fixture, because it was not placed in the building when it was erected, was easily removed, and was, therefore, merely a chattel. Several cases were cited to support this position, and great reliance was placed on the case in 14 Mass. 352 [*Gale v. Ward*, 7 Am. Dec. 223], in which Chief Justice Parker did consider three carding machines in a wool-carding factory as personal property.

Upon an attentive examination of that case, I can not think that it essentially resembles the one under consideration. There the carding machines were not a necessary part of the manufactory, and essential to its operations. Nor were the three machines therein mentioned, in strictness, fixtures; for it clearly appears that they stood on the floor of the factory building; that they were not nailed to the floor, nor in any manner attached or annexed to the building, except by a leather band, which passed over the wheel or pulley, to give motion to the machines. Now, in the case before us, the boiler was fastened and fixed in the building, and it is plain that it must have been so, to be serviceable or beneficial. When a brewery is about to be erected, a particular place is assigned for the boiler, which is carefully walled in, and is as necessary to the brewery as a chimney to a house. All the witnesses said, that this copper boiler was an essential part of the brewery, without which the business could not be commenced nor carried on. This boiler, therefore, could not be levied on, or sold as personalty, and the administrator of Graham could not lawfully pledge it as such. The cases cited from 15 Mass. 159, in which it was decided that a dye kettle, fixed in brickwork, in a fulling mill, was a part of the realty, and that from Mason's Rep. 459¹, in which Justice Story, after a careful review of all the cases on the subject, decided that the main mill wheel and gearing of a factory attached to the same, and necessary for its operation, are fixtures and real estate, are, in the opinion of this court, decisive of the first question.

As to the second question, whether the boiler, if it were a fixture, being severed from the freehold, at the time of the sale

1. *Powell v. M. B. Manf'g. Co.*, 3 Mason's C. C. 450.

or transfer to Gray, may not, therefore, be held under that transfer, we deem it only necessary to remark, after what has been already stated, that as it was not severed from the brewery by the owner of the freehold, it remained part thereof, and James Gray could not, under the circumstances, derive any advantage from that transaction. Besides, the mechanics' lien had attached before the boiler was severed and before the transfer to him. In Shep. Touch. 90, it is laid down that "that which is parcel or of the essence of a thing, although at the time of the grant it be actually severed from it, does pass by the grant of the thing itself. And, therefore, by the grant of a mill, the mill-stone doth pass, although at the time of the grant it be actually severed from the mill. So, by the grant of a house, the doors, windows, locks, and keys do pass as parcel thereof, although at the time of the grant they be actually severed from it." As there was no severance here at any time before the mechanics' lien had completely attached, the plaintiff can not hold the boiler under the transfer. The judgment of the circuit court must therefore be affirmed.

TOD, J. I am not able to agree entirely with the rest of the court. The old rules of the common law about annexation to the freehold have been much relaxed in modern times in favor of trade and manufactures. Holdship was employed to put up the building; therefore, I admit his lien under the act of assembly covered not the house only, but the lot on which the house stood. But, in my opinion, it did not affect the copper boiler, which was set up, not by Holdship, nor at his expense, but by Graham, then owner of the freehold, and this some time after all Holdship's work had been finished. This copper boiler or brew-kettle, which, by the way, was no inconsiderable part of the expense, which appears to have been set up in brick work in the middle of the brewery, was, upon Graham's death, distrained on by the ground landlord for arrears of ground rent, amounting to two hundred dollars, and removed from its place, but not out of the building. Upon that, Gray, the plaintiff, by agreement with Graham's administrator, redeemed the property by advancing the two hundred dollars, the amount of the landlord's demand, stipulating with the administrator that he, Gray, should hold the copper boiler in pledge for the repayment of his money so advanced, and in default of payment by a certain short day, that he should hold the property absolutely. Holdship, the builder of the house, not having been paid for his work and materials, proceeded to enforce his lien by *scire facias*,

under the act of assembly. And, on Holdship's execution, the lot and the building were sold by the sheriff. Holdship himself became the purchaser, and under the purchase he claims the copper boiler as a fixture annexed to and passing with the freehold. This action is brought in consequence of a special agreement between the parties to try their respective rights. My opinion would be that Gray's title is valid to secure his money advanced and the interest upon it, and no more; and that Holdship has no title at all.

This is not a case of dispute between co-heirs or co-devisees, or between heir and executor, or a case of dower claimed out of the brewery, or a dispute between tenant for life and remainder-man. I take it, a broad distinction has been established, and that as between mortgagee and mortgagor, and between landlord and tenant and all similar cases, fixtures for manufacturing purposes, and sometimes even for agricultural purposes, not consolidated with the walls nor incorporated with the freehold, set up by a mortgagor after the mortgage, or by a tenant during his term, may be removed, provided it can be done leaving the freehold property in as good condition as they found it. The present case seems in substance to be that of a prior mortgage, and afterwards on erection of fixtures by the mortgagor. If there is any difference, that difference is against Mr. Holdship; for certain it is that a voluntary actual mortgage would appear to be stronger against Graham and against Graham's administrator than a mere implied mortgage or pledge by an act of law to secure the builder's charges. I shall only refer, as shortly as possible, to some authorities which may seem to justify me in dissenting from the court. Toll. Law of Exec. 96, enumerates the things which may be removed from the freehold, and names brewing vessels, vats for dyers, and soap-boilers' coppers, provided it can be done without injury to the fabric of the house; and this even between heir and executor. By 2 Com. Dig., new ed., Biens, B. in note, the removal of such fixtures may be made by the tenant after the end of his term. Lord Hardwicke seems to have considered the point in question as so completely settled eighty years ago, that he brings it in by way of illustration of other cases supposed to be doubtful. The question being whether a fire engine, set up for working a colliery, was personal estate, or part of the freehold; he says, *inter alia*: "But it has been insisted, that fixing it in order to make it work, is properly an annexation to the freehold. To be sure, in the old cases, they go a great way upon the annexation to the freehold, and so long ago as Henry the Seventh's time, the courts

of law construed even a copper and furnaces to be part of the freehold. Since that time the general ground that courts have gone upon, of relaxing the strict construction of law, is that it is for the benefit of the public to encourage tenants for life, to do what is advantageous for the estate during their term." And, again: "Coppers, and all sorts of brewing vessels, cannot possibly be used without being as much fixed as fire engines, and in brew houses especially, pipes must be laid through the walls; and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them." He observes: "This is not a case between the ancestor and heir." *Lawton v. Lawton*, 3 Atk. 13.

In another case, where, under a mortgage of a brew house, with its appurtenances, the utensils for brewing were claimed by the mortgagee, the same chancellor remarks: "I am inclined to think it was not the intent of the mortgagor to mortgage the utensils; for there is some description generally, of things in a brew house." The rule as to fixtures, as between an heir and an executor, is another thing, etc. How does it stand between a purchaser and a vendor? "If a man sells a house where there is a copper or a brew house, where there are utensils, unless there was some consideration given for them, and a valuation set upon them, they would not pass." *Ex parte Quincy*, 1 Atk. 477.

In the *Union Bank v. Emerson*, 15 Mass. 159, it was held that a kettle in a fulling mill, set in brick work, passed by a mortgage of the mill, but the court expressly add: "Had the defendant, after making the mortgage deed, put this kettle into the mill we should have considered him authorized to remove it before delivering possession to the plaintiffs."

Gale v. Ward, 14 Mass. 356 [7 Am. Dec. 223], decides, that a carding machine in a wool factory, and 6 Johns. 5, that a stone for grinding bark, affixed to a bark mill, were no parts of the freehold. In 20 Johns. 29, tenant for years after the end of his term was permitted to carry off a cider mill put up by himself: *Cresson v. Stout*, 17 Johns. 121 [8 Am. Dec. 373], appears to be in substance the very case before us. It was a case of a mortgage. There were sundry carding and spinning machines and frames. The court held that such of the frames as had been put up subsequent to the making of the mortgage, did not pass to the mortgagee. The case of *Powell and Wife v. The Manufacturing Company etc.*, 3 Mason, 549,¹ cited for the plaint-

1. *Powell v. M. B. Man'f. Co.*, 3 Mason's C. C. 450.

iff, appears to me inapplicable. Not only was it a case of the main mill wheel and gearing of a factory, but it was a case of claim of dower, and the fixtures had been erected by the husband himself: *Goddard v. Chase*, 7 Mass. 432, also cited by the plaintiff's counsel, was the case of a defendant, who after his house had been transferred to a creditor by process of law, in satisfaction of a debt, re-entered and tore away some cast-iron stoves from the chimneys; which, it was decided, he could not legally do. I take it, that in Pennsylvania, stoves and grates are generally considered personal property, certainly so as between landlord and tenant. The Massachusetts case appears to have been decided on its own circumstances; for it was in proof, that the appraisers of the house included the stoves in their estimate of its value, and that was one of the reasons given by the court for their opinion. Clearly, the creditor must have been held to be a purchaser of the stoves.

Another exception has been urged by the plaintiff's counsel. The judge rejected proof showing that Holdship, in order to procure a condemnation of the property, appeared before the inquest by Mr. Forward, his counsel, and insisted that the copper boiler in question was no part of the levy, nor of the freehold, and being merely personal estate, ought not to be taken into the valuation. I agree with my brethren, that such proof was rightly rejected. I dislike this matter of giving the arguments of counsel in evidence against their clients. But, if instead of an argument upon the law, it had been an assertion of a fact, then I should hold the evidence to be legal, not only to show full notice to Holdship of Gray's title, but upon the principles established in the case *Ex parte Quincy*, and in the Massachusetts case of *Goddard v. Chase*, proving a very material thing, that Holdship, at the sheriff's sale, could not have intended to make a purchase of the copper boiler.

Judgment affirmed.

FIXTURES, WHAT ARE—WHEN ERECTED BY OWNER OF THE FREEHOLD.—The subject of fixtures was considered, somewhat briefly, in the notes to *Holmes v. Tremper*, 11 Am. Dec. 238, and to *Hunt v. Mullanphy*, 14 Id. 300. The first-named note was devoted to the discussion of the question, when, or within what time, a tenant must exercise the right to remove his fixtures, or be precluded from asserting his claim to them. In the note to the latter case, we did little more than to quote the language of Bartley, C. J., in delivering the opinion of the court, in *Tearff v. Hewitt*, 1 Ohio St. 511, and to cite a few decisions which were supposed to afford illustrations of the application of the tests prescribed by Judge Bartley.

There is an immense mass of law-learning upon the subject of "fixtures,"

and in fact the question, whether the subject-matter of litigation is or is not a fixture, arises in such a variety of forms, and the decision thereof depends so largely upon some peculiar circumstance of each case, that in attempting to gain light from the authorities found in the reports, great caution must be exercised to avoid being led into confusion. And, again, the rapid evolution of a progressive civilization, the constantly-increasing wants of man, and the never-ending discoveries and inventions of things of utility which rapidly pass into the category of articles of necessity, throw around us new conditions daily, and render it necessary to scan each decision carefully and view it by the lights under which it was written before accepting as the law of to-day what was the law at some former date. The relations existing between the litigants are important under this branch of the law, for, what might, as between landlord and tenant, be very clearly personalty, may, as between executor and heir, mortgagor and mortgagee, or vendor and vendee, be quite as clearly a part of the realty.

It must necessarily happen that, in the progress of time, the things embraced within the term "movable fixtures," must, with respect to one class of litigants, be constantly increasing, and with respect to another class of litigants, be as constantly decreasing in magnitude and variety. Thus, for the encouragement of trade and manufactures, and for other laudable objects, the law has been, and no doubt will continue to be modified in favor of persons holding real property by a leasehold estate. On the other hand, many things are now annexed to realty by the owner thereof, and intended by him to be a permanent accession thereto, which, but a few years ago, either did not exist, or were but rarely used in connection with, and as a part of, real property. In this note, we shall not undertake to treat, unless incidentally, of the law of fixtures applicable to the relation of landlord and tenant. What we shall say must be understood as having reference to the law as it will be applied in determining the right to remove fixtures erected by one whose claims are not so indulgently treated as are those of a tenant seeking, as against his landlord, to remove improvements made by him during the continuance of his lease.

Courts have striven to lay down some general rule by which the facts of each case might be tested and the conclusion clearly derived, whether a particular thing under certain circumstances constituted a part of the realty or not, but no satisfactory rule has been devised, and, we apprehend, never will be, owing to the difficulties inherent in the nature of the property itself. And this natural difficulty leads to a very considerable real, and much greater apparent conflict of decisions. For instance, in one case a steam engine, under certain circumstances, is held to be a part of the realty, and in another case, scarcely distinguishable in the facts, it is declared to be personalty. Much of this conflict is undoubtedly more apparent than real, and arises from the fact, that a particular circumstance, which seems trivial to one mind, is of controlling importance in the estimation of another. The courts have, however, established general rules, which will materially aid in determining any given case.

One of the rules most frequently referred to, relates to the physical annexation of a chattel to the realty in such a manner that it can not be detached without injury to the inheritance. Whether this physical annexation has taken place in a given case, is necessarily a question of fact upon which different juries might return inconsistent verdicts. But we apprehend that this question must usually arise in controversies between landlord and tenant, in which the former insists that the latter has so incorporated some chattel into the leased premises that it has become an inseparable part thereof. But, as be-

tween vendor and vendee, mortgagor and mortgagee, heir and executor, the controversy usually does not require the determination of the question, whether the property in dispute has been physically annexed so that it can not be detached without injury to the freehold. The question in these controversies more frequently than otherwise relates to the appropriation of certain property to such a use in connection with the realty, as to indicate an intention on the part of the person making the appropriation, he being at that time the owner both of the realty and of the property in dispute, that the property should thereafter be used as a part of the realty for the better and more convenient enjoyment thereof. It is true that some cases are not altogether in harmony with this view, and perhaps tend to sustain the old idea, that an actual physical annexation must be shown.

In the case of *Peck v. Batchelder*, 40 Vt. 233, it appeared that the defendant, being the owner of a certain house and lot, conveyed the same to the plaintiff. The defendant, while such owner, made some double windows, and fitted them to the windows inside of the house, where they remained for some time, when they were taken down and set away. He made them expressly for the house, but had never fastened them in in any manner. He also had certain blinds made for the house. These were taken from the shop and set up by or near the windows in which they were intended to be used, but were never fitted to or put on those windows. When he contemplated a sale of his place, he did not intend to sell these double windows or blinds, and, therefore, secreted them all, so that the purchaser never knew of their existence until after he had made his purchase and taken possession under it. The purchaser having brought an action of trover to recover for the property, and the case having been taken to the supreme court on appeal, the opinion of that court was delivered by Wilson, J., as follows: "The only question in this case is, whether the title to the property, described in the plaintiff's declaration, passed to him by the defendant's deed of April 29, 1865. In order to entitle the plaintiff to recover, it was incumbent on him to show that the windows or blinds had become and were a part of the building conveyed to him by the defendant. The report of the referee finds that the blinds were never in any manner attached to the building or windows, or even fitted to them. In regard to the windows, it appears they were made for the house, fitted to its window casings, and set up on the inside of the windows belonging to the house, where they remained a short time, and previous to the sale of the house the defendant took them down and put them away. They were never nailed or fastened in, and no preparations had been made to fasten them to the house. It appears the defendant owned the blinds and windows in question at the time he conveyed the house to the plaintiff; and if they had become, and were at that time, a part of the house conveyed, the fact that the defendant secreted them previous to the conveyance, or that the plaintiff had, at the time of the conveyance, no knowledge of their existence, would not defeat the plaintiff's right to the property. In the construction of a building, its doors, windows, blinds, shutters, etc., become a part of the building, and the manner of annexation is of no particular importance. There must be actual or constructive annexation in order to make them a part of the building.

"At the time the defendant conveyed to the plaintiff, the building had in it all the windows it was constructed with or for, and the mere fact that the defendant had made some sash, painted them, and set glass in them, intending to use them at some future time, in the construction of double windows for the house, does not constitute even constructive annexation. In order to

make such windows a part of the realty, they must have been so annexed or attached to, or used upon the building, as to indicate that the owner intended, by such annexation or use, to make them a part of the building. The window frames and casings of the house were not constructed for double windows, and the referee has not found that the defendant had prepared even the ordinary stops by which double windows could have been permanently attached to the house, or securely kept in place. It is evident, from the manner in which these windows were put in, that if they had been taken out and put back a few times, they would have become loose and have fallen off, unless they had been in some way fastened to the building. The very manner in which the defendant put these windows in, and temporarily used them, shows that he did not intend, by such act or use, to make them a part of the building. The referee finds the defendant did not intend these windows or blinds should pass with the house. The plaintiff, in the purchase of the house, was not deceived in respect to the windows or blinds. There was nothing upon the house or windows attached to it indicating that double windows or blinds had been attached to the building, or that such windows or blinds belonged to the house. The plaintiff, at the time of the conveyance, had no knowledge or information that double windows or blinds had been attached to the building, or made for that purpose; there is, therefore, no ground to claim that the price paid for the property was in any way affected in faith of double windows or blinds. We are of opinion that the windows and blinds for which the plaintiff claims to recover, were never so attached to the house as to become a part of the realty, and they did not pass to the plaintiff by the deed of the house."

We doubt whether this decision can be reconciled with itself, or safely relied upon as an authority to overthrow or to establish any legal principle whatsoever. The statement of facts shows that the double windows in controversy were made for the owner of the freehold, and were expressly constructed for, and adapted to, the windows in his house; that they were actually put in place and used until the termination of that season of the year in which their use was desirable; that he had at the time of fitting in these double windows no intention of selling or removing from the property, nor of appropriating them to the use of any other premises. The only act of annexation, usual or proper in the case of such double windows, which was omitted by the proprietor in this instance, was the inserting in the original window frames or casings of such hooks and eyes as would better secure the double windows in their places. But these hooks and eyes, if inserted, would in no manner interfere with the removal of the double windows, or cause such removal to operate as a destruction of any part of the freehold; and their absence appears, from all the facts of the case, to be more justly attributable to the neglect or improvidence of the proprietor than to any existing intent on his part to make a mere temporary use of the articles in question as a part of his dwelling. The supreme court took the pains to state that if the windows had become a part of the house conveyed, their secretion previous to the conveyance, and the purchaser's consequent ignorance of their existence, would not defeat his right of recovery; but the same court, in a subsequent part of its opinion, so strongly emphasizes the fact that the purchaser was not deceived when making his purchase, that we incline to the view that the removal and secreting of the property must have been treated as of controlling importance in the minds of the judges. As a matter of law, the court concedes that the doors, windows, blinds, shutters, etc., in each building are a

part thereof, and that "the manner of their annexation is of no particular importance," and that such annexation may be either actual or constructive.

The comparatively recent case of *Brown v. Lillie*, 6 Nev. 244, is sometimes referred to as supporting the doctrine that a chattel does not become a part of the realty, unless so attached thereto that it can not be removed without injury to the freehold; but in this case the property in controversy was a saw-mill, and though both costly and cumbrous, it belonged to a class of property that, according to the custom of the country, was frequently removed from one neighborhood to another. It was, moreover, constructed upon the lands of the United States, under such circumstances as preclude the possibility of its constructor's ever having entertained any intention of making it a part of the real estate, or permanently using it in the place where it was erected. After its erection, the land on which it stood was purchased of the United States, and under this purchase it was claimed that the patentee of the government had obtained the title to the saw-mill, as against the person by whom it was erected. This claim was denied by the supreme court of the state. Its decision may be maintained on the ground that the mill was not erected by the owner of the freehold, nor with any intent to make any permanent accession thereto. On like grounds we apprehend that the decision of the supreme court of Ohio, in the case of *Wagner v. Cleveland, etc. R. R. Co.*, 22 Ohio St. 563; 10 Am. Rep. 770, to the effect that stone piers and abutments for a bridge built by a railroad company upon lands over which it had acquired a right of way, did not, on the subsequent abandonment of its road, pass to the landowner as fixtures.

It is usually said that the right to retain property as annexed to the soil, prevails with the utmost rigor in favor of the heir of the party making the annexation, in a contest in which the executor seeks to recover the property as personalty: 1 Schouler on Personal Property, 141; *Colegrave v. Dias Santos*, 2 B. & Cress. 76; *Fisher v. Dixon*, 12 Cl. & F. 312; 9 Jur. 883. But we doubt whether this be altogether correct; for we think that the law has been at least as favorably construed in favor of mortgagees as of heirs: *Climie v. Wood*, L. R., 4 Exch. Cases, 328; *In re Richards*, 4 L. R. Ch. 630; *Longbottom v. Berry*, L. R., 5 Q. B. 123; *Holland v. Hodgson*, 7 C. P. Exch. 328; 41 L. J. C. P. (N. S.) 146; 20 W. R. 990.

Whether the controversy arises out of a claim interposed by the heir, vendee, or mortgagee of the owner of the fee, we think is, in most cases, immaterial. The true test, we apprehend, in either of such cases, is this: Was the property in controversy made a part of the freehold for the enjoyment of the inheritance? To make it a part of the freehold, there need not be any physical annexation; the property may be attached with screws or hinges in such a manner that its removal will work no injury to the inheritance; or it may be that it is retained in its place solely by the laws of gravitation. Thus, fencing material accidentally or temporarily detached, after having been used as a part of a fence: *Goodrich v. Jones*, 2 Hill, 142; or placed along the line of a contemplated fence, but not yet used, because the construction of the fence is not completed, has been adjudged to be real estate: *Conklin v. Parsons*, 1 Chandler, 240; and so has manure produced upon a farm, even as against the tenant thereof: *Kittredge v. Woods*, 3 N. H. 503 [14 Am. Dec. 393]; *Chase v. Wingate*, 6 Reporter, 749, and the note thereto. In the case of *Lawton v. Salmon*, 1 H. Bla. 259, n., salt-pans, in use in certain salt works, were the property in controversy. It was admitted that the pans were, in fact, removable without any damage either to themselves or the building in which they were placed. They were, nevertheless, held to be real estate, because the

inheritance could not be enjoyed without them, and the owner must have erected them for the benefit of the inheritance. Following the principle deducible from this case, the courts have repeatedly determined that when a building is fitted up as a manufactory by the owner of the fee, the machinery placed therein, and essential to the manufactory, becomes a part of the realty, and, therefore, passes to the grantee or heir of the owner: *Green v. Phillips*, 26 Gratt. 572; 22 Am. Rep. 323; *O. W. M. Co. v. Hawley*, 44 Ia. 57; 24 Am. Rep. 719; *Farrar v. Stackpole*, 6 Greenl. 154; *The Queen v. Inhabitants of Parish of Lee*, L. R., 1 Q. B. 241; 14 W. R. 311; *Hubbard v. Bagshaw*, 4 Sim. 326; *Longbottom v. Berry*, L. R., 5 Q. B. 123. If a part of a machine is an irremovable fixture, another essential part thereof, though movable without any damage to the freehold, must also be treated as realty: *Mather v. Fraser*, 2 Kay & J. 536; 2 Jur. N. S. 900; 25 L. J. Ch. 361. Fixtures which would be removable by a tenant, when annexed to the freehold by its owner for permanent use, become a part thereof. Hence, when the owner of premises on which he carried on business as an innkeeper, brewer and bath-house proprietor, placed in the buildings a steam engine, boiler, hay-cutter, malt mill, corn-crusher and grinding-stones, in such a manner that all could be removed without injury to the buildings, all these articles were held to have thus been converted into realty, because the circumstances showed that the proprietor intended to use them permanently as a part of the property: *Walmesley v. Milne*, 7 C. B. N. S. 115; 6 Jur. N. S. 125; 29 L. J. C. P. 97; 1 L. T. N. S. 92; and this decision seems to be in harmony with *McMillan v. Fish*, 6 Reporter, 661; *Hill v. National Bank*, 8 Id. 577; 97 U. S. 450; *McConnell v. Blood*, 123 Mass. 47; *Mather v. Fraser*, 2 Kay & J. 526; 2 Jur. N. S. 900; 25 L. J. Ch. 361; *Jenkins v. Gething*, 2 Johns. & H. 520; *Wynne v. Ingleby*, 1 D. & R. 247; 5 B. & A. 625; *Meig's Appeal*, 62 Pa. St. 28; 1 Am. Rep. 372; *Stockwell v. Campbell*, 39 Conn. 362; 12 Am. Rep. 393; *Hutchinson v. Kay*, 23 Beav. 413; *Ex parte Reynall*, 2 M. D. & De G. 443; *Ex parte Montgomery and Bristow*, 4 Ir. Ch. Rep. N. S. 520; *Boyd v. Shorrock*, 16 W. R. 102; L. R., 5 Eq. 72; *Holland v. Hodgson*, L. R., 7 C. P. 328; 41 L. J. C. P. N. S. 146; 20 W. R. 990. Mr. Justice Blackburn, in the last named case, after reviewing the prior English adjudications, said: "Now, all these cases seem authorities for this principle, that where an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land, at all events where the object of setting up the article is to enhance the value of the premises to which it is annexed, for the purposes to which these premises are applied." Hence, a threshing-machine fixed in a barn by means of screws and bolts: *Wiltshear v. Cottrell*, 1 E. & B. 674; a bell hung upon a frame, and fastened to it by a hasp, the frame being nailed to the cupola of a barn: *Weston v. Weston*, 102 Mass. 514; and tapestry, pictures in panels, frames filled with satin, and attached to the walls, statues, figures, vases, and stone garden-seats have been held to be a part of the realty: *D'Eyncourt v. Gregory*, L. R., 5 Eq. Cas. 382; 36 L. J. Ch. 107; 15 W. R. 186.

GAS FIXTURES consisting of burners, brackets, chandeliers, etc., are now in common use in every city in which the number of inhabitants justifies the erection and maintenance of gas works. These fixtures are generally, and perhaps universally, attached to gas pipes, and held in place by means of screws, and they may be detached, by unscrewing them, without working any injury to, or any destruction of any part of the building or premises to which they are attached. It has been claimed that gas fixtures ought, in all cases, to be deemed personalty because they have superseded lamps and candles, which could never be anything but chattels. This claim, if main-

tainable in principle, ought to extend to water pipes and hydrants, because they have merely supplanted pitchers and buckets, and to dwelling-houses, because they only supply the place of the tents which the first families of men moved from place to place, and which were never designed to be affixed to the soil, or to remain permanently in any one neighborhood. Gas lighting was said, in one case, to be a necessary part of a mill: *Hutchinson v. Kay*, 23 Beav. 413. In many instances, gas fixtures are just as essentially a part of the freehold as are the shutters on the windows, or the keys in the doors. Nevertheless, the majority of the reported decisions seem to hold that these fixtures are, even when attached by the owner of the fee, mere chattels.

The first case is *Montague v. Dent*, 10 Rich. 135, in which the court lay stress upon the circumstance that gas fixtures are not permanently affixed to the building, being merely screwed into the fittings in the walls and ceilings, and being easily removable. And the court also say that the chandeliers, etc., "were not necessary to the enjoyment of the freehold, for the use of gas itself does not deserve to rank in that category. It is much more matter of convenience than of necessity, or even serious importance."

In *Vaughen v. Haldeman*, 33 Pa. St. 522, the supreme court of Pennsylvania, in the year 1859, decided that gas fixtures, chandeliers, etc., were personal property, and did not pass by a sale of the realty to which they were attached under a foreclosure. The court say: "There is, therefore, really nothing to distinguish this new apparatus from the old lamps, candle-sticks and chandeliers, which have always been considered as personal chattels. Gas stoves are largely used for bath and other rooms, and are necessarily connected with the gas pipes in the same way, but no one would think of saying that they were fixtures, which it would be waste to remove. It is, therefore, more simple to consider all these gas fixtures, whether stoves, chandeliers, hall and entry lamps, drop lights, or table lamps, as governed by the same rule as the articles for which they were substituted." This decision was approved in 1875, by the same court, in *Jarecki v. Philharmonic Society*, 79 Pa. St. 404.

In *Rogers v. Crow*, 30 Mo. 92, the supreme court of Missouri held that gas fixtures in a church were movable chattels, the decision being based upon *Montague v. Dent*, and *Vaughen v. Haldeman*, *supra*, and two other cases, viz.: *Lawrence v. Kemp*, 1 Duer, 363, and *Wall v. Hinds*, 4 Gray, 256, both of which were cases between landlord and tenant, which fact, however, seems to have escaped the observation of that learned court. We can not subscribe to the broad doctrine laid down in these three cases, that gas fixtures are in all cases personalty, and in no case an appurtenance to the realty. In fact, it seems to our mind a very simple proposition that gas fixtures, chandeliers, brackets, etc., may or may not become attached to the realty so as to pass by a sale of the land, according to the particular circumstances.

The question whether gaseliers were fixtures was directly presented to the court of common pleas, before Judge Willes, in *Sewell v. Angerstein*, 18 L. T., n. s. 300. Sewell bought from Angerstein the lease of a certain house, the lease expressing that all fixtures whatever on the premises were conveyed. The action was brought for a breach of covenants, and it was admitted that a verdict should be for the plaintiff, if the defendant should not be allowed to set off the value of certain gaseliers. It appeared in evidence that the gaseliers were fixed to the gaspipes by means of screws, and could be unscrewed and removed in about twenty minutes without causing any injury to the property, and that they were quite new, being still wrapped in the paper as they had come from the makers. Judge Willes said: "The gas-

eliers are a part of the gaspipes, and, to use a legal expression, they take their nature, and are included in the fixtures, which go with the house under the lease. They are as much a part of the gaspipes as the mill-stones are part of the mill. Although the gaseliers may be unscrewed and taken off without injuring the freehold, they are necessary to the enjoyment of the gaspipes, which are of no practical use when separated from them." On being asked to reserve the point, the judge said that he entertained a very decided opinion in the matter; but in order to save expense to the parties, he consulted with the judges of the other court, and on his return said: "I am confirmed in my view of the case, and think that the gaseliers ought to have been the subject of a separate agreement. As it is, they form part of the freehold, and were a part of the thing let, just as much as a pump-handle is a part of the pump; the handle may no doubt be removed without injury to the pump, but then the pump would be of no use without the handle." Verdict was given for the plaintiff. Upon the authority of this decision it was stated in *Keeler v. Keeler*, 31 N. J. E. (4 Stew.) 191, a suit between a mortgagee of the chattels on certain premises, and a subsequent mortgagee of the realty, on which the chattels were situated, that the gas burners were fixtures. "They are in no sense furniture, but are mere accessories to the mill."

By far the greatest number of decisions, and coming from equally respectable courts, disregard the old, unyielding, and to our mind unreasonable rule, that nothing became a fixture unless so annexed or fastened to the soil, or to that which was imbedded in, or fastened to the soil, that the ground or some structure thereon must be broken or dilapidated in removing the chattel, and have declared that the question must be solved upon more liberal and intelligent reasoning.

The supreme court of Kentucky, in the case of *Johnson's Executor v. Wiseman*, 4 Metc. Rep. 360, uses the following language: "It has been held in the same cases that to give chattels the character of fixtures, and deprive them of that of personalty, they must be so firmly fixed to the realty that they can not be removed without injury to the freehold from the act of removal and apart from the subtraction of the thing removed; but the better opinion is, however, the other way, and in favor of viewing everything as a fixture, which has been attached to the realty, with a view to the purposes for which it is held or employed, however slight or temporary the connection between them. It has, accordingly, been decided in a great number of cases that the machinery of a manufactory is to be regarded as a part of the realty, whether it be attached to the body of the building, or merely connected with the other machinery by running bands or gearing, which may be thrown off at pleasure, and without injury to the freehold. Nor can it be said that actual annexation was so essentially necessary to constitute a fixture, even in the earliest and most technical periods of the common law, as to bear down and overpower all other considerations. The doctrine of heir-looms necessarily implies that chattels may be deprived of their movable and personal character, and rendered inseparably attendant upon the inheritance by the force of moral association. It has never been doubted that the keys of a house, or fences or walls of a farm, are part of the freehold. It was held in *Kittredge v. Wood*, 3 N. H. 503 [14 Am. Dec. 393], and *Parsons v. Camp*, 11 Conn. 525, that the manure on a farm at the time it was sold, vested in the vendee. And these decisions were followed in *Goodrich v. Jones*, 2 Hill, 142, and the purchaser held to be both entitled to the manure and the fences, although the latter had been detached from the soil. These authorities are cited to show that the ancient rule, which treated nothing as fixtures, except such

chattels as were fastened to the realty, and were more or less immovable, has been modified and molded to suit the improvements in arts and science of modern times. * * * The question whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold, than upon their own nature and their adaptation to the purposes for which they are used."

This doctrine is sustained by the following authorities: Jones on Mortgages, sec. 429; *Quimby v. Manhattan C. & P. Co.*, 24 N. J. Eq. 260; *Potter v. Cromwell*, 40 N. Y. 287; *McRea v. Cent'l Nat'l Bank*, 66 N. Y. 494; *Voorhies v. McGinnis*, 54 N. Y. 324; *Hill v. Wentworth*, 28 Vt. 432; *The Ottumwa W. M. Co. v. Hawley*, 44 Iowa, 57. In the last case above cited the court quote from the opinion in *Teaff v. Hewitt*, 1 Ohio St. 511, wherein it is said: "The true criterion of a fixture is the united application of the following requisites: 1. Actual annexation to the realty, or something appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is appropriated; 3. The intention of the party making the annexation to make a permanent accession to the freehold," and afterwards says: "The third requisite, being the intention of the party making the annexation to make a permanent accession to the freehold, is to our minds the controlling consideration in determining the whole question. The character of the physical attachment, whether slight or otherwise, and the use, are mainly important in determining the intention of the party making the annexation." The text in Jones on Mortgages is also sustained by *Corliss v. McSagin*, 26 Maine, 116, and by *State Savings Bank v. Kercheval*, 65 Mo. 682.

In *Main v. Schwarzwaelder*, 4 E. D. Smith, 275, the court of common pleas of New York stated the rule as derived from the authorities, and said: "All things which are necessary to the full and free enjoyment of the freehold, and are in any way attached to it, are held to be fixtures, and pass with it." And the same principle is announced in a somewhat different form in the case of *Richardson v. Borden*, in the supreme court of Mississippi: 42 Miss. 71; 2 American Reports, 595.

In *Bishop v. Bishop*, 11 N. Y. 125, the court of appeals held that hop-poles were fixtures, and passed with the land, although pulled up and piled on the land at the time of sale, and approvingly cited *Walker v. Sherman*, 20 Wend. 655, wherein Justice Cowen declared that the chattel, in order to become a fixture, should be "habitually attached to the land or some building upon it. It need not be constantly fastened." The same doctrine was declared by the supreme judicial court of Maine, in *Farrar v. Stackpole*, 6 Greenleaf, 154, wherein it was held that chains, etc., used as appliances in a saw-mill, but in no way physically attached thereto, were fixtures, and passed with the land. And many other cases are to be found where the doctrine of constructive annexation to the soil is fully recognized, as, for instance, in *Snedeker v. Warring*, 12 N. Y. 170, and in *Brown v. Lillie*, 6 Nev. 246.

It seems clear that the current of modern authorities is decidedly adverse to any arbitrary or unyielding rule by which it may be determined whether a thing is or is not a fixture; but the more rational and liberal rule laid down in *Teaff v. Hewitt* is now pretty generally accepted by the courts of the several states. It is founded in the every-day experiences and observations of men, and is supported by persuasive reasoning. It is easy to understand that a city lot is real estate, and a redwood post or a cart-load of brick is personalty, but there is more difficulty in determining just at what point the post or brick may become a part of the realty, and if we attempt to solve this question by the sole test of the character or extent of the actual annex-

ation to the soil, we will experience many perplexing difficulties. Suppose the owner of the soil erects an expensive brick dwelling, and by advice of his architect makes no excavation, but builds his walls upon the natural surface of the ground, and for the purpose of erecting scaffolding for his masons to stand upon while laying the brick, sets rough posts into the ground a few feet from the walls, and all around the house. During the process of building he puts a mortgage upon the lot, and in his mortgage makes the usual covenants against the removal of any of the tenements or improvements. When the house is finished, and he proceeds to remove the rough and unsightly posts, no one would contend that he was committing waste, and liable to be restrained at the suit of his mortgagee, and still this would be the inevitable result if we look alone to the extent of annexation, for the posts were set firmly into the earth, and could not be removed without disturbing the soil. Upon the other hand, the building is not fastened to the soil in any way, only remains in position by gravitation, and could be removed without disturbing the earth in the least. Now it is plain to the mind of every one that the house becomes a part of the real estate, and the posts do not, although the posts are much more firmly annexed to the earth than is the house, which would not be true if the degree of annexation is to be the sole test.

The decision in *Teaff v. Hewitt* satisfactorily solves the whole question by declaring that the degree or nature of annexation to the soil is only an element or circumstance (and even a subordinate circumstance tending to throw light upon the more material inquiry as to the intent in appropriating the chattel), in determining whether or not the chattel has become a fixture. And, in fact, nearly all the cases cited herein, in one way or another, recognize the rational doctrine; some of the cases going, in our opinion, even beyond the reason of the rule. The true criterion of a fixture, in our judgment, is the united application of the following requisites: 1. "Actual annexation to the realty, or something appurtenant thereto," with this modification, that the annexation is not, of necessity, an absolute fastening or continued physical union in all cases; 2. "Application to the use or purpose to which that part of the realty with which it is connected is appropriated;" and, 3. "The intention of the party making the annexation to make a permanent accession to the freehold." The requisite of intention is the most important, and should be clearly understood; the word "intention" here having its broad and comprehensive signification, and not merely implying the secret action of the mind of the owner of the property. The owner of an important lot might deposit thereon a block of dressed stone with no outward indication of appropriation to any use in connection with the land, and it could remain a chattel, notwithstanding some secret mental purpose of the owner that it should be and remain a part of the soil, and this even though the stone should in time settle partially into the earth; but if the owner should erect a building upon the lot, and place this stone upon the surface of the ground in front of a door in such manner as to become a step by which to reach the door and enter the house, and all the surroundings, architecture, etc., indicated that it was intended for permanent use as a part of the general plan, it would at once become a fixture, and this even though the owner might entertain some secret intention of taking it away at some future time.

The rule of law that the intention of the owner of the fee is of controlling importance in determining whether a chattel has become an irremovable fixture is confirmed and approved in the recent cases of *Arnold v. Crowder*, 81 Ill. 56; 25 Am. Rep. 260; and *Hutchings v. Masterson*, 46 Tex. 551; 26

Am. Rep. 286. In the first-named case, platform scales, bolted and fastened to sills laid upon a brick wall, set in the ground, and intended for permanent use on a farm for weighing stock and grain, were held, as between mortgagor and mortgagee, to be a part of the realty. In the last-named case, a like decision was made in reference to a sugar mill on a plantation which was sold to the grantee of the defendant in the action.

The principal case is cited in *Morgan v. Arthurs*, 3 Watts, 141; *Lemar v. Miles*, 4 Id. 332; *Voorhis v. Freeman*, 2 W. & S. 119; *Heaton v. Findlay*, 12 Pa. St. 307; *Rogers v. Gilinger*, 30 Id. 189; 31 Id. 158; *Whitmer's Appeal*, 45 Id. 462; *Covey v. P. F. W. & C. R. Co.*, 3 Phila. 178.

WILEY v. MOOR.

[17 SERGEANT & RAWLE, 438.]

BOND—FILLED UP AFTER SIGNING—WHEN VALID.—Where two persons signed and sealed a blank piece of paper, and left it with the judge of the court to be filled up, conditioned to take the benefit of the insolvent act, which was done; held, that the bond was valid and binding.

WRIT of error to court of common pleas of Beaver County. Debt on a bond, against Moor and Thompson.

Moor, being in custody, applied to Judge Drennan to give a bond and receive a discharge, and, for that purpose, defendants wrote their names on a blank bond, and affixed their seals, and left it to be filled up. Moor obtained his discharge, and the bond was afterwards filled up as directed by defendants. The court charged the jury, that when a deed has been acknowledged and certified the parties have no right to making the most trifling alteration in the same. The law provides that the defendant may give a bond to the plaintiff with security, approved by the judge; and when approved, any alteration renders it void. The judge, in whose possession the bond remains, has completed his duty when he approves the bond and discharges the prisoner, and he cannot exercise a ministerial power in relation to the bond any more than a third person could.

Watson, for plaintiff in error, cited 6 Serg. & Rawle, 14; 14 Id. 423; 13 Id. 423.

Watts, contra, cited 1 Pet. 47; 13 Serg. & R. 190; 14 Id. 380, 2 Stark Ev. 456; 1 Dall. 67.

By Court, ROGERS, J. The ancient principle, Shep. Touch. 54; Perk. sect. 118, and Co. Lit. 171, "that if a man seal and deliver an empty piece of paper or parchment, albeit he do therein withal give commandment that an obligation or other matter shall be written in it, and this be done accordingly; yet

this is no good deed," has been overruled in the more modern cases. The point came before the court of king's bench, in *Texira v. Evans*, cited and relied on in *Master v. Miller*, 1 Anstruth, 229.¹ The case occurred before Lord Mansfield, and was this: Evans wanted to borrow four hundred pounds, or so much of it as his credit should be able to raise; for this purpose he executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bonds. Texira lent two hundred pounds on it, and the agent accordingly filled up the blanks with that sum and Texira's name, and delivered the bond to him. On *non est factum* pleaded, Lord Mansfield held it a good deed. The same point came before the supreme court of Pennsylvania, in *Sigfried v. Levan*, 6 Serg. & Rawle, 308 [9 Am. Dec. 427]. The plea was *non est factum*, and, on objection to the deed, it was admitted in evidence, and finally a verdict was given for the plaintiff. Although the question was not directly decided, as it arises on the admissibility of the evidence, yet it may be collected from the case, that the opinion of the court was in conformity to the case of *Texira v. Evans*. Judge Duncan enters into an elaborate review of the authorities, although *Texira v. Evans* seems to have escaped his attention. In delivering the opinion, he says: "I would consider him (that is, Peter Levan, who filled up the bond) as the agent of the defendants; at least, I would so leave it to the jury; and, if he is so considered, then he delivered the bond to the plaintiff, having authority so to do, and it would be their deed." The obligors wrote their names and affixed their seals to a piece of paper, and agreed that Judge Drennan should fill up the bond, which was accordingly done. It is part of the case that the instructions were faithfully fulfilled, nor is there any pretense that after the bond was completed any alteration was made in it. It is an ungracious defense on the part of the defendants, who do not allege any mistake of the instructions, or any fraud, but seek to take advantage of a technical principle to defeat a just debt. To hold that this comes within the principle, "That where a deed has been acknowledged before a magistrate appointed by law to take and certify the acknowledgment, in order that the deed may be recorded, the parties have no right to make the most trifling alteration," is a misapplication of the principle. Judge Drennan stands in the situation, not only of a magistrate, but an agent. The deed was complete only when filled up according to his instructions. The delivery

1. Anstruther's, 229.

and acknowledgment take effect from that time, and it is not pretended that any alteration was made after the completion of the deed. This is nothing more than the application to a sealed instrument, of a practice which has been repeatedly recognized in relation to promissory notes and bills of exchange. There is as much danger from the one as the other, and in the absence of mistake, it is so far from being productive, that it is a prevention of fraud. My attention has been called to the case of *Harrison v. Tiernans*, 4 Rand.,¹ in which it was held: "That a bail bond, which was returned to the clerk's office, but which specifies no sum to be paid by the obligor to the obligee, is a mere nullity." The reason which is assigned is perfectly satisfactory: "That a bond is a deed, whereby the obligor obliges himself to pay a certain sum of money to another at a day appointed. That the obligation to pay money is of the essence of a bond, and is in fact the only stipulation which the bond contains." The distinction taken by the judge, between a bill of exchange and a bond, is unnecessary to the decision of the main point, and is not borne out to its fullest extent by authority. It is in opposition to *Trainer v. Evans*,² and *Sigfried v. Levan*; and, however respectable as a dictum, it is not sufficient to overrule the adjudged cases.

Judgment reversed and a *scire facias de novo* awarded.

Cited in *Ogle v. Graham*, 2 P. and W. 134.

1. 4 Rand, 177.

2. *Taira v. Evans*, cited in *Master v. Miller*, 1 Anstruther's, 220.

CASES
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

SINGLETON v. BREMAR.

[4 McCORD, 12.]

GIFT OF LAND TO TAKE EFFECT AFTER THE DEATH of the donor has all the properties of a will.

SALE OF PROPERTY, GIVEN AS A LEGACY, by the testator in his life-time, operates as an ademption of the legacy.

FREE TAKING EFFECT IN FUTURO can not be created by deed; and a deed to take effect at the grantor's death is void.

THIS RULE IS NOT ABROGATED by substituting delivery of the deed for livery of seisin.

COVENANT TO STAND SEISED must be supported by a good or valuable consideration, and the mere insertion of the words "having received full value" will not support such a covenant.

RECOVERY ON A BREACH OF SUCH COVENANT must be measured by the consideration paid.

ACTION on two promissory notes given by the defendant's intestate, Francis Bremar. Defense, want of consideration. Evidence was introduced on the part of the defendant tending to show that the consideration of the notes was past illicit cohabitation between the deceased and the plaintiff, who had been his kept mistress, and that there could have been no other consideration, because she had nothing except what he gave her. In rebuttal the plaintiff offered in evidence an instrument of writing, which she claimed to be a conveyance from the deceased to the plaintiff of a valuable house and lot in Charleston, and offered to prove that the deceased afterwards sold the said house and lot and received the purchase-money. The instrument of writing was as follows: "I do hereby, in case of my death, give to Tabitha Singleton (a free brown woman) my

house and lot in Wentworth street, and to the said Tabitha Singleton, her heirs and assigns forever, having received full value, and I do hereby warrant and defend the same from me and my heirs and all and every person or persons whatsoever. Given under my hand and seal, this eighteenth day of May, 1809. Sealed, delivered," etc. The paper was objected to as void, on the ground that it was a conveyance to commence in *futuro*; but the judge, before whom the cause was tried below, admitted it, and instructed the jury, among other things, that the deed gave the plaintiff a title to the house and lot on Bremar's death, a life-estate being reserved to himself. Verdict for the plaintiff. Appeal and motion for a new trial on the ground of misdirection.

Petigru, Attorney-general, and Harper, for the appellant, contended that the deed was void, being limited to take effect in *futuro*, and that, being founded on an immoral consideration, it could not be supported as a covenant to stand seised, citing *Coleman v. Sorrell*, 3 Bro. C. C. 12; 1 Ves. jun. 54; 1 Ves. 514.

Hunt, contra. The presumption is that the notes were given for a valuable consideration, and the fact that the deceased sold the plaintiff's house and lot and took the purchase-money is conclusive: 7 Johns. 321; 8 Id. 465; 9 Id. 217; 5 Wheat. 277. The deed produced, though not a legal conveyance, was a covenant to stand seised to the use of the covenantor for life, remainder to the plaintiff, which use would be executed by the statute in *præsenti*: 3 Com. Dig. 253, tit. Covenant; Preston on Estates, 217. It purported to be for value received, and it was only necessary that the grantor in such a covenant should be seised at the time: 2 Wils. 75. The court would look to the covenantor's intention: Co. Lit. 154, b; *Coltman v. Senhouse*, 2 Lev. 225.

By Court, JOHNSON, J. It is objected that the presiding judge misdirected the jury in charging them that this instrument gave the plaintiff a fair claim on the estate of the intestate for as much as her interest in the house was worth at the time it was sold. The natural import of the terms used in the first part of this paper, would unquestionably give it the effect and operation of a will. By the term give, a voluntary donation is strongly implied, and the provision that is to take effect after his death superadds all the properties of a will. If it is to receive this interpretation, then the sale of the house by F. Bremar in his life-time was an ademption of the legacy, and

the plaintiff took no interest under it. It is impossible, I think, by any rule of interpretation so to construe this paper as to vest any interest in possession in the plaintiff; the paper itself does not profess to convey any; on the contrary, it is limited to take effect at the death of the intestate; and it is one of the settled rules of the common law that a fee can not be created to take effect *in futuro*: 2 Bl. Com. 165; 2 Wood. 177; and such a deed would therefore be void. It is urged, however, that this rule is abrogated in this country by the substitution of the delivery of the deed, instead of the common law mode of passing it, by livery of seisin. But I apprehend that the delivery of the deed could not operate to vest a fee *eo instanti* in opposition to its express provision. The fee can never be in abeyance; and the principle on which the rule is founded I take to be this, that the power of disposing of the fee is inseparable from the person in whom it is vested, and so long as it abides there the power remains. It follows, therefore, that the plaintiff had no interest in possession in the house and lot at the time of the sale.

It has been further insisted that although it may not operate to vest an interest in possession, it is good as a covenant to stand seised to the use of the plaintiff; but to support such a covenant, there must be either a good or a valuable consideration. A general consideration, it is true, is expressed on this paper by the terms "having received full value;" but it must be recollected that the object in introducing it in evidence is in effect to recover for a breach of the covenant; and as the recovery in an action founded on such a covenant must be measured by the consideration paid, it is impossible to judge of it from this general expression, and hence the rule that a general consideration, such, for instance, as "divers good causes and considerations," is not sufficient to support such a covenant: See Com. Digest, Title Cov. 9, 4, 5, and the cases there cited.

It follows, therefore, that the plaintiff took nothing under this paper, whether it be regarded as a will or deed; nor can it operate as a covenant to stand seised to her use; so that, in fact, there was no interest arising out of it which entitled her, either in law or equity, to any claim or demand against the intestate, Bremar, or the defendant, his legal representative. The charge of the presiding judge was, therefore, calculated to mislead the jury in this respect, and for that reason a new trial is granted.

Motion granted.

EXPRESSING CONSIDERATION IN DEED.—In *Okison v. Patterson*, 1 Watts & S. 395, it was held, on the authority of *Jackson v. Alexander*, 3 Johns. 478; S. C. 3 Am. Dec. 517; and *Jackson v. Root*, 18 Johns. 60, that although the consideration must be expressed in a deed of bargain and sale, to raise a use, the amount need not be stated; and that the words “for a valuable consideration” constituted a sufficient acknowledgment of consideration for that purpose; and the court referred to *Singleton v. Bremar*, as holding a different doctrine. A deed of bargain and sale must express a valuable consideration: *Chiles v. Coleman* [12 Am. Dec. 396].

DEED TO TAKE EFFECT AFTER THE GRANTOR'S DEATH.—As to the validity of a deed which is to take effect at the grantor's death, see the note to *Jones v. Jones*, 16 Am. Dec. 39.

COVENANT TO STAND SEISED, CONSIDERATION OF.—See on this point *Jackson v. Sebring*, 8 Am. Dec. 357, and the note thereto.

ADEMPION OF LEGACY.—This subject is discussed in the note to *Walton v. Walton*, 11 Am. Dec. 470.

WHETHER INSTRUMENT IS DEED OR WILL.—Where it is doubtful whether an instrument is a deed or a will, the intention may be ascertained not only from its contents, but from evidence as to how the parties regarded it: *Robertson v. Duan*, 5 Am. Dec. 525.

STATE v. RYAN.

[4 McCORD, 16.]

INDICTMENT FOR STEALING GOODS OF THREE PERSONS named is not supported by proof of stealing goods of each of them in which they had no joint interest.

INDICTMENT for stealing certain articles of property stated “to be of the proper goods and chattels” of A., B., and C. It appeared on the trial that the articles were stolen at different times from different places; some of them belonging to each of the persons named, but none belonging to all jointly. After conviction, the defendants moved for a new trial, on the ground that the evidence did not support the indictment, and appealed to this court.

Dawson, for the appellant, cited 1 Chit. 138, 141, 513; Hob. 295; 1 Arch. 25; Carth. 225.

Cruger, contra, cited 1 Chit. 248, 249, 253; 2 Burr. 984.

By Court, NORR, J. It is laid down by Chitty that an indictment ought to have all the certainty of a declaration, for that all the rules that apply to civil proceedings are applicable to criminal accusations: 1 Chitty's C. L. 141, 172. It is, therefore, necessary to state in an indictment for larceny the name of the person to whom the goods belong, and, if they are laid

to be the goods of one person and found to belong to another, the variance will be fatal: 1 Chitty C. L. 175, 213; Archbold 10, 11, 117. It may be laid in the indictment that the goods belonged to a person unknown, if that is actually the case; yet if the owner be really known, the allegation will be improper, and the prisoner must be discharged from the indictment: 1 Chitty, *ut supra*. In this case the articles stolen are stated to be the proper goods and chattels of A., B., and C. The inference is that they are the joint property of those three persons. The proof is that some of the goods are the property of each of them, respectively, but that they have no joint interest in any part of them. The proof, therefore, does not correspond with the allegation. Let us test the principle by analogy to the proceedings in a civil action. Suppose a person should be charged in a declaration with a debt due to A., B., and C. for goods, wares, and merchandise, sold and delivered, etc., and it should come out in evidence that a part of the goods belonged to A., a part to B. and a part to C., but that no part of them was the joint property of all. It will not be pretended that such evidence would support the declaration. But it is said that the only mode of taking advantage of such an error is by moving to quash the indictment before plea, or of compelling the prosecutor to elect on which charge he will try the prisoner: 1 Chitty C. L. 204, 249. But that rule applies only to those cases where distinct offenses are separately charged in such a manner that the prisoner is apprised of the several charges to which he is called to answer. In such cases he is considered as having waived the objection by pleading to the indictment. In the case now under consideration no error appears on the face of the indictment. The defendants could not know that they were charged with several distinct offenses until it came out in evidence. They ought, then, to have been acquitted on this indictment, and a new trial must therefore be granted.

Motion granted.

ELCOCK'S WILL.

[4 McCORD, 39.]

WILL OF PERSONALTY EXISTS ONLY FROM THE DEATH of the testator, and must be executed according to the laws in force at that time.

AMENDMENT OF THE STATUTE AFTER THE EXECUTION OF A WILL of personalty, and before the testator's death, relating to the number of attesting witnesses required, applies to such will, and renders it void if it is not attested by the specified number.

APPEAL from a verdict in the circuit court against the probate of a certain alleged will, on an appeal to that court from a like decision by the ordinary. The objection to the will was that it was not attested by three witnesses, as required by the act of 1824. It appeared that the will was executed before the act was passed, but that the death of the testator occurred after the act went into effect. The proponent of the will claimed that the statute did not apply, but the ordinary and the judge at the circuit thought otherwise.

King, for the will. The will was ambulatory until the death, but was good until changed: *Mathew v. Warner*, 4 Ves. 200; *Slade v. Cooper*, 1 Phil. 336, n. (a.); 2 Nott & McC. 482. A will executed before the statute of frauds, was good, though the testator died afterwards: *Gilmore v. Shooler*, 2 Mod. 310. So a will attested by one witness was good, notwithstanding a subsequent change in the statute before the testator's death: *Noel v. Clark*, 3 Mod. 218; *Ashburnham v. Bradshaw*, 7 Id. 239; *Sergeant v. Punter*, Prec. in Ch. 77; Skin. 227; *Downing v. Townsend*, Amb. 280; *Addington v. Andrews*, 3 Atk. 149. The civil law rule was the same: 2 Voet, 272; 10 Inst. L. 1, T. 2, p. 6.

Finley, contra. The will is subject to the law existing at the death, though enacted after its execution: *Dyer*, 143; Com. Dig., tit. Devise. A will of personalty takes effect only at the testator's death, but under a devise of realty the property is considered as having vested at the execution: 1 Rob. on Wills, 231, 232; 7 Mod. 242. Thus, a devise to one's children vests only in those then living: 2 Salk. 591; Cowp. 97; 6 Cruise Dig. 69; Amb. 451.

By Court, Nott, J. The question submitted to us in this case was decided at our last sitting in Columbia, in the case of *Houston v. Houston*, 3 McCord, 491 [15 Am. Dec. 647]. That case was submitted to the court without argument, and the opinion made up and delivered in the hasty manner in which many of our decisions necessarily must be amidst the pressure of business under which we labor. It was, however, founded on what was thought to be a very familiar principle, to wit, that all the personal estate which a man has at the time of his death, passes under his will, although acquired after the time of its execution, from whence it was concluded the will must be considered as having existence only from the time of the death, and not from that of execution; and if it is to take effect from the time of the death only, it must be executed according to the provisions of the law at that time.

In support of that construction of the act, we not only have the unanimous opinion of this court, but the concurring opinions of two ordinaries and two of the circuit judges on the same point. We have, nevertheless, upon the solicitation of the counsel for the appellant, submitted to an argument with a view of giving the question a further consideration, and to afford an opportunity of looking into the authorities upon the subject. And I am now authorized to say that the argument has produced no change in the opinions of this court. With regard to those passages from the Civil Law and the Code Civile, which have been relied on, even if they admit of the construction which the counsel supposes, they can not affect the question. We never resort to the civil law as authority. It may be resorted to for the purpose of illustrating those principles of the common law which have been derived from that source, and no further. And no case has been adduced from any of the books, either in law or equity, in support of the doctrine contended for on the part of the appellants, which is thought applicable to the case now under consideration. The strongest is perhaps that of *Downes v. Townsend and others*, Ambler, 290¹, where Lord Hardwicke is reported to have made use of the following observation: "The general rule as to testaments is, that the time of the testament and not the testator's death is regarded." But that *dictum* must be taken with reference to the particular question to which it was applied. Lord Hardwicke was looking for the intention of a testator as expressed in a specific bequest, contained in a testamentary paper. It was the intention alone of which he was speaking, and not of the execution nor of the time from whence it would take effect. He said, and undoubtedly said correctly, that the general rule was the time of the testament, and not the death of the testator. We must suppose that when a person is disposing of property, he must mean the property which he possesses at the time, because he can not know what property he may in future acquire. When, therefore, a person makes a specific bequest, he must necessarily refer to some specific thing then in his power or possession. And yet, in the same case, Lord Hardwicke says, where the legacy is universal, as of all a man's goods, or even where it is specific, if of property in its nature fluctuating, as a flock of sheep, it must relate to the death. Several cases have been quoted from modern reports, but the one principally relied on is *Ashburnham v. Bradshaw*, 7 Mod. 239. That was a devise made before the statute

1. *Downing v. Townsend*, Ambler, 280.

of George II., avoiding devises to charitable uses, and the testator died afterwards. It was referred to the judges to determine whether the will would still take effect, or whether it was revoked by the statute; and ten out of twelve of the judges held that the land would still pass under the will, but they gave no reason for their opinions. Besides, that was a devise of real estate; and a distinction has always been made between a will of real and personal estate. One which all the books concur in is, that a will of real estate carries only the land which the devisor has at the time of making the will, but that a testament of personal estate carries all the goods which he has at the time of his death, although he may have acquired them after making the will. And that distinction is relied on by Lord Chancellor Northington, in the case of the *Attorney-general v. Hartwell*, Ambler, 451, where a will of personal estate came under his consideration, depending upon the construction of the same statute of George II. In speaking of the case of *Ashburnham v. Bradshaw*, he says: "That was the case of real estate, but as to personal estate it admits of a different consideration." And in that case he held that the will was rendered void by the statute. We are told in the argument that the decrees of Lord Northington are not to be relied on as authority.

We can not consider the single decision of any English judge as conclusive authority; but it would be very difficult to fix a scale by which to ascertain the exact degree of credit to which they are respectively entitled. We can only allow them the weight to which we think they are entitled according to the notions we may entertain of the general principles of law to which they relate. It is said in Ambler, 451, that when the lord chancellor first started the distinction between real and personal estate, as affecting the question, it was a surprise upon the counsel on all sides; from whence it is argued that they were surprised that such a distinction should be made. But I apprehend that all that was meant by that observation was that the distinction had not occurred to the counsel, and not that it was so new or extraordinary that they were surprised to hear it from the bench. But Mr. Eden, who had collected the decisions of Lord Northington from his own original manuscripts, does not find that remark contained in this case. He has indeed introduced it into his report, but it is inclosed in a parenthesis and given upon the authority of Ambler alone, and not of the chancellor: 2 Eden, 284. But the distinction is as well settled as any rule of law whatever, and goes to reconcile all

the cases on the subject. It may be an arbitrary one, but it is not more so than many of the distinctions between real and personal property, which are nevertheless obligatory upon this court. It is also to be observed that the Modern Reports are not of the highest authority. Of the sixth volume it is said that it is "a book of no repute;" the eighth a miserable bad book; the tenth of little authority; and the eleventh a book of no authority; and these are the opinions of Lord Hardwicke, Lord Mansfield, and Judge Buller; and if I were under the necessity of expressing an opinion on the case of *Ashburnham v. Bradshaw*, I should feel much disposed to concur with Lord Chancellor Northington, "that a great deal might be said against the determination." But without resorting to any other authority than the act itself, I should come to the same conclusion. It will hardly admit of any other construction. It declares that "from and after the first day of May next all wills or testaments of personal property shall be executed in writing, etc., or else they shall be utterly void and of no effect." It does not say wills shall be made after such a time, for then, perhaps, it might have excluded those which had been previously executed, though the testator had died afterwards; but that all shall be void which are not thus executed. It appears as if time was allowed for the purpose of affording an opportunity for those who had made their wills to alter them so as to render them conformable to the provisions of the act; and would it not appear repugnant to all our notions of consistency that a will executed before the passage of the act should pass property acquired afterwards, though not executed according to the provisions of it? I think the case of *Houston v. Houston* not only consistent with the general principles of the law, but with the express letter of the act, and that the motion in this case must be refused.

New trial refused.

BOYD v. LADSON.

[4 McCORD, 76.]

BOOKS OF ACCOUNT AS EVIDENCE.—Our act does not authorize the admission of books of account as evidence, but it recognizes the custom of admitting them as having become law.

MERCHANTS, TRADERS, AND HANDICRAFTSMEN are spoken of in the act, the provisions of which relate to shop books, merchants' accounts, and accounts for work done.

ACT HAS BEEN EXTENDED to cases within its spirit though not within the letter; as, to millers for sawing and selling lumber, and to printers for advertising.

MECHANICS' ACCOUNTS are admissible to prove performance of a particular job and articles furnished, but the articles must be specified, and a general charge for work and labor, it seems, is not good.

FERRYMAN'S BOOKS have been held admissible, but this is doubtful.

BILLIARD-TABLE KEEPER'S BOOKS are not admissible in evidence.

ASSUMPT for sundry games of billiards tried before the recorder of Charleston. The plaintiff offered a book of original entries to prove her account, but the recorder rejected the evidence and directed a nonsuit. Motion to reverse the decision.

By Court, Nott, J. We have no act expressly authorizing books of account of any description to be received as evidence of the entries which they contain when accompanied with the oath of the party. Our act recognizes a custom as having prevailed of admitting such evidence from necessity, and recognizes it as having become law from long usage; and we usually refer to that act for the description of cases in which such evidence is to be admitted. The persons spoken of are merchants, traders, and handicraftsmen; the provisions of the act relate to shop books, merchants' accounts, and accounts for work done. In the construction of this act, our courts have extended the rule to other cases where the same necessity exists, and which seem to come within the spirit, though not within the letter, of the act. It has therefore been extended to millers who saw and sell lumber, *Darby and Farrow*, 1 McCord, 517, and to a printer for advertising: 1 Nott & McCord, 186, *Thomas v. Dyott*. I think that was giving to the law a very liberal construction, and in the case of *Richards v. Howard*, 2 Id. 474, the court appear somewhat dissatisfied with that decision, and imposed a restriction, which goes very far to narrow the effect of it by requiring the printer to produce his file to show that the work was actually performed. In the case of the *Administrators of Thomas Lynch* ads. *E. Pettrie*, it was decided that the books of a bricklayer or other mechanic were admissible to prove the performance of a particular job of work in the course of his trade and articles furnished, but that the articles must be specified, and that a general charge for work and labor was not good. I do not myself very distinctly see the reason of the distinction made in that case, for work and labor may be performed by a person without furnishing material. However, I think it is a strong case against the present

application. In the case of *Frazier v. Drayton*, 2 Nott & McCord, 471, it was held that the books of a ferryman were admissible to prove an account of ferriage. It will be somewhat difficult, perhaps, to distinguish that case from this. But I believe the judges who made that decision have never been satisfied with it. The keepers of ferries are not in the habit, usually, of giving credit. It is a privilege which can only be allowed to immediate neighbors; and then they ought to be considered as having trusted to their honor, and not to rely on book entries for proof of their accounts, and that observation will apply more strongly to the case now under consideration.

It is also very questionable whether the consideration is such as will support a contract. It would be giving encouragement to schools of vice and immorality to suffer such books to be evidence. It is said in the case of *Herlock v. Riser*, 1 McCord, 481, that the question can not be affected by considerations of policy or of morality. But that was the case of a shopkeeper. It came directly within the purview of the act, and although the charges were principally for whisky, which may be used to a vicious extent, yet there is nothing immoral in the selling of whisky; and although the privilege may be abused, it can not alter the nature of the evidence by which the fact is to be proved.

The plaintiff in this action is not a shopkeeper, merchant, handicraftsman, or mechanic, nor can the case be brought within the description of any of those in which books of entries have been allowed. The action is not for articles of any kind sold or delivered, services rendered, or for work or labor. And if these books are to be allowed, I do not see why the books of showmen rope dancers, and gamblers of every description may not be admitted. I think, therefore, that the opinion of the recorder must be supported. Admitting a party to be a witness in his own cause is under any circumstances a dangerous innovation on the principles of the common law, and ought not to be suffered except in cases of necessity, and then only when its object is to promote some general good. This case is not one of that description, and the motion, therefore, must be refused.

Motion refused.

BOOKS OF ACCOUNT AS EVIDENCE.—For an extended discussion of the subject of the admissibility of books of account as evidence, see the note to *Union Bank v. Knapp*, 15 Am. Dec. 191.

TAYLOR v. HAMPTON.

[4 McCord, 96.]

PRIVILEGE CLAIMED IN DEROGATION OF ANOTHER'S RIGHTS is viewed with jealousy by the law, and must be strictly confined within prescribed limits.

LIMITS OF PRIVILEGE OF MAINTAINING A POND appurtenant to a mill, overflowing another's land, by a purchaser of such mill, are the height at which the water was kept at the time of the purchase, and the object to which it was then applied.

EXTINGUISHMENT OF AN INCORPOREAL HEREDITAMENT, for a moment, is its complete destruction, so that it is gone forever; and is not its mere suspension.

SUCH RIGHTS ARE DENOMINATED SERVITUDES in the civil law.

EXTINGUISHMENT MAY BE EITHER BY THE ACT OF GOD, operation of law, or the act of the party.

ACT OF THE PARTY WILL EXTINGUISH A RIGHT where the act of God or of the law will only cause its suspension.

EXPRESS OR IMPLIED RENUNCIATION will extinguish a servitude.

OBSTRUCTION OF A SERVITUDE by another's act only suspends it.

RIGHT MAY BE DESTROYED either by an act of the party positively destructive of it, or by an act incompatible with the nature or exercise of it.

PERMANENT OBSTRUCTION of a servitude by the party himself destroys it, and it can not be revived except by a new grant; it is otherwise as to a temporary obstruction.

RIGHT TO MAINTAIN A MILL POND overflowing another's land, for the purpose of supplying a mill, will be extinguished by the act of a purchaser, who himself erects another mill on a different spot, and diverts the water thereto, so that the old mill can not be used as it formerly was, while the new one is in operation; and such right will not be revived by the destruction of the new mill, and the restoration of the water to the former channel.

ACTION for overflowing the plaintiff's land. It appeared that in 1807 Mr. Charles Pinckney, being the owner of the tracts of land now owned by the plaintiff and defendant, sold and conveyed the said tracts to the parties respectively. There was at the time a mill pond, dam, and mill in full operation on the land conveyed to the defendant. The deed conveyed the land with all the "rights, members, and appurtenances" thereunto belonging, but did not mention the mill. A plat of survey was, however, annexed and referred to in the deed, on which was written the word "mill," indicating the spot where the mill stood, and which represented a great part of the land as covered with water. The mill was continued as before until 1814, when the defendant erected a new mill, called the merchant mill, above it, on the same creek, on a part of the land previously covered by the pond. A new dam was erected above the

new mill, and the water was diverted into artificial channels carrying it to the two mills respectively. After the new mill was erected, the old one could not be operated by the water running in the old channel, because the water would be thereby thrown back on the new mill. The lower dam was cut when the new mill was built, but was immediately replaced. The flood gates were maintained, but the water was never raised, except occasionally for flowing rice, until 1823, when the new mill having been burned, the old one was repaired, and the water restored to the former channel. The pond, being raised for the purpose of operating the mill, caused the water to flow back on the plaintiff's land, which was the trespass complained of.

Verdict for the plaintiff, on the ground that the water was raised two feet higher than it was when the defendant purchased. Motion for a new trial, because the verdict was not supported by the evidence; and because the defendant had a prescriptive right to raise the water as he had done.

W. F. De Saussure and Gregg, for the motion, as to the effect of the conveyance to the defendant, cited 2 Bl. Com. 16; 2 Vin. 598; *Nicholas v. Chamberlain*, Cro. Jac. 121; 2 Cai. 87, 104; 2 Bac. Ab., Cov. F.77; *Platt v. Root*, 15 Johns. 218;¹ Louisiana Code, 404, 406; 4 Com. Dig. Grant E. 9, 11; *Pickering v. Stapler*, 5 Serg. & R. 107 [9 Am. Dec. 336]; 3 Bac. Ab., tit. Grant, 15 Johns. 454; Yelv. 159, note; and on the question of extinguishment or abandonment of the defendant's right: 1 Cowp. 216; *Beaty v. Shaw*, 6 East, 215; *White v. Crawford*, 10 Mass. 189; Domat, 200; 2 Poth. Con. 133; 3 Dane Ab. 45, tit. Nuisance; Id. 275, tit. Ways; 10 Mass. 183, 379; 3 Stark. Ev. 1215, note e; Ang. Water-courses, 39, 41, 49; Louisiana Code, 1066, tit. Occupancy; Id. 240, 248, 256, art. 812; Code Nap., sec. 704.

Preston and Harper, contra. An easement is against common right and the genius of the law: Co. Lit. 147; 1 Salk. 170; Cro. Eliz. 800; 1 Dom. 207, 208, 217, tit. 12, par. 6, 480; 2 T.R. 81; Ang. on Water-courses, 41, 67, 69; Appendix, 74; *Hatch v. Dwight*, Id., App. 180 [9 Am. Dec. 145]; 1 Heineccius, 137, 247; 1 Code Nap. 647, par. 703; 3 Id. 151; *Tarrant v. Terry*, 1 Bay, 238; 3 Atk. 83; Coop. Just. 618; 1 Esp. 364; Dig. L. 8, tit. 6; 4 Co. 87; Cro. Jac. 170; 3 Salk. 46; Yelv. 159; 7 Mass. 6; Saund. 323, note 6; Id. 175; Co. Lit. 56, 172, 121 b, 49; 2 Selw. 1252; 1 Roll. 935; *Polly v. Thompson*, 1 Bos. & P. 371; 1

1. *Platt v. Johnson*, 15 Johns. 218 [8 Am. Dec. 233].

Lev. 131; Cro. Car. 57; *Sir Moile's case*, 6 Co. 63; Hob. 108, 235; Willes, 332; Vaughan, 261.

By Court, NORR, J. If the event of this motion depended alone on the ground taken for a new trial, this court would not interfere with the verdict. There was a great deal of conflicting evidence of which it was the province of the jury to judge, and the court is not dissatisfied with the result. But in the course of the investigation two other questions have been submitted to the consideration of the court.

1. Whether by the terms of the deed the mill was conveyed to the defendant in the character or with the qualities of a mill, so as to give him a right to keep up the pond to the injury of Mr. Pinckney, of whom he bought, and of the present plaintiff, who purchased from him?

2. If it was, whether the erection of the upper mill, the existence and enjoyment of which being incompatible with the use of the other, by means of this pond, did not amount to an extinguishment of that right? These questions are equally new and important to the people of this country. They have been very ably and learnedly argued by the counsel on both sides. And if they are not correctly decided it will be on account of their intrinsic difficulty, and not because they have not received all the light of which they are susceptible.

On the first ground it has been contended that the defendant has purchased the land only "with the rights, members, and appurtenances thereunto belonging." That the pond is not an appurtenance of the land. If it is appurtenant to anything, it must be to the mill, and could not pass without an express grant of the thing to which it is appurtenant. And as the mill is not specifically conveyed, it passes only under the general description of land, and not as a mill, and therefore carries with it none of the appurtenances of a mill. This is a question of no inconsiderable importance in this state where the usual mode of conveyance is very short and simple. But as I have formed my opinion on the second ground, I shall not go into a consideration of it at present.

I will pass on to the consideration of the question, whether the defendant has not, by the erection of a new mill, and the means connected with it, extinguished the right which he had of keeping up such a head of water as to overflow the plaintiff's land?

In considering this question it must be assumed that the de-

fendant had a right to keep up the water to the height to which it was raised at the time he purchased, even though the consequences were the overflowing of the plaintiff's land. I would nevertheless observe that every privilege of this sort which one man claims in derogation of the rights of another is viewed with jealousy by the law, and as an object not highly entitled to its favor. It will require, therefore, that it be confined to the prescribed limits and specific objects of the grant.

The privilege contended for is the right of keeping up a pond. The prescribed limits are the height to which it was kept at the time of the purchase, and the specific object to which it was then applied, to wit, the support of the mill. The present object of our inquiry, however, is not whether General Hampton is still entitled to the enjoyment of that privilege, but whether that right has not become extinguished by subsequent circumstances. In the prosecution of that inquiry, I shall make use of the word "extinguishment" as being, in my opinion, the best calculated to convey the idea I mean to express. It is also to be understood that I mean by that word an entire annihilation or destruction, and not a mere suspension of the right. And I shall endeavor to show that a right of this sort, that is, an incorporeal hereditament, once extinguished, is forever gone, and cannot revive. That an extinguishment, therefore, for one moment is an extinguishment forever.

Rights of this sort are denominated by the civil law "servitudes," which is construed "survitutes or services," for I observe that it has received both constructions. It is a subject, therefore, on which we shall receive no little instruction from that source. For although the common law is the law of this state, and it is by the rules of the common law that this case is to be governed, yet the civil law may be resorted to by way of illustration. I will, therefore, first commence with the common law, and will then show that the principles there laid down are equally well supported by the civil law.

The word "extinct," Lord Coke says, cometh from the verb *extinguere*, to destroy or put out: Co. Lit. 146, 147. In Bacon it is said, whenever a right or interest is destroyed or taken away by the act of God, operation of law, or act of the party, this in many books is called extinguishment: 3 Bac. Tit. Extinguishment. See, also, Terms de la Ley and Jacob's Law Dictionary, under the same title, where a great number of cases are put to show the distinction between the extinguishment and the suspension of a right. And here it may be remarked that

an extinguishment may be either by the act of God, operation of law, or the act of the party. And so rigid is the law that the act of the party will effect an extinguishment of a right, where the act of God or of the law will only cause a suspension of it. And for the most obvious reason. The act of a party shall always be construed most strongly against himself, but he shall not be injured by an act of God or of the law. The same distinction is made in the civil law. In the code of Louisiana, 246, after mentioning the various methods by which servitudes may be extinguished, it is said that servitudes are extinguished when the things are in such a situation that they can no longer be used, and when they remain perpetually in that situation. But if the things are re-established in such a manner that they may be used, the servitude will only have been suspended. And in page 256 it is said a servitude may be extinguished by a renunciation of the party, either express or implied; as permitting the party from whom the servitude is due to build a wall or house, etc.

The distinction between extinguishment and suspension is very well illustrated by the two cases put by Domat, lib. 1, sec. 6, fo. 207, tit. Services. If the proprietor of the land or tenement for which the service was established acquired the property of the land or tenement which serves, and afterwards sells it again, without reserving the service, it is sold free; for the service was annulled and is not re-established to the prejudice of the new purchaser.

But if between the land or tenement which serves and that to which the service is due, there be another land or tenement which hinders the use of the service, the service is suspended only while the obstacle remains. Here it is seen that when the act which prevents the service is by the party himself, to whom the service is due, it is wholly extinguished, but when by another, it is only suspended, because it was not his fault or neglect that it was not demanded. And that distinction will be found to run through all the books.

Let us now see what act of the party will amount to a renunciation or extinguishment of his right. That has, indeed, been shown to a considerable extent by the cases which have been already adduced. But I will endeavor to show that it is a general principle both of the common and civil law, that any right may be destroyed, not only by an act of the party, positively destructive of the right itself, but by an act incompatible with the nature or exercise of it. Thus, for instance, by the old common

law the giving a bond for the payment of money, by a master to his servant or villain, or bringing an action against him, amounted to a manumission or extinguishment of his right of service, because such acts were inconsistent with the relation of master and servant: 2 Bl. Com. 92. By the civil law, even admitting the servant to sit at the master's table amounted to a manumission: 1 Brown, Civil Law, 109. If one holding an office accept another inconsistent with it, even though it be an inferior one, it will be an extinguishment of the other: *Millwood v. Thatcher*,¹ 2 T. R. 81. By the marriage of an obligor with an obligee, the debt is extinguished: 3 Bacon, 107, tit. Extinguishment. If any one stands by and sees another build on his land, without interposing his claim, his right is extinguished: *Tarrant v. Terry*, 1 Bay. 240; *East India Company v. Vincent*, 2 Atk. 83. So, if a person have a right of way from one close to another, and he grant the close to different persons, his right is destroyed: *Dill v. Balshorpe*, Cro. Eliz. 300.² All these cases and many more which might be added if necessary, go to establish the general principle, that two inconsistent rights can not exist together, and that the creation of a new and inconsistent right by the party himself, is an extinguishment of a former one. And having established the general principle, it only remains to show by particular cases the application of those principles to the case now under consideration. In 2 Jacob's L. D. 448, tit. Extinguishment, it is said, A. has a stream of water which runs through a leaden pipe. If B. purchase the land and destroy the pipe, the water-course is extinct, because by this he declares his intent and purpose that he will not enjoy them together. So a way is extinguished by unity, and is not revived by severance, for which Bulstrode is cited. See, also, *Whalley v. Thompson*, 1 Bos. & P. 373.

In the Louisiana code it is said, "servitudes are extinguished by renunciation or voluntary release of them by the owner of the estate to whom they are due. This renunciation may be express or tacit. The release of the servitude is tacit when the owner of the estate to which it is due permits the owner of the estate charged with servitude to build on it such works as presupposes an annihilation of the right:" 246, 258. From this authority it appears that two things are necessary to effect the object: 1. That the works constructed be of a permanent, solid kind, such as a "wall or edifice;" 2. That they present an absolute obstacle to every kind of exercise of the servitude. Now, the case

1. *Millward v. Thatcher*.2. *Dell v. Balshorpe*, Cro. Eliz. 300.

put by way of illustration is, "when the owner of the estate to which the servitude is due permits the owner of the estate charged with the servitude to build," etc. But it will equally follow, and still more strongly, as I have already shown, when the owner himself who claims the servitude, commits the act. Thus, in the case from Jacob's L. D., where the stream of water was diverted by the person entitled to the use of it having cut the pipe through which it was conveyed, it was held that the right was extinguished. Yet when a person has a right of way to a spring, and the spring becomes dry, though the right cease for a time, if the spring chance to flow again, the right revives: 1 Dom. 206; which also supports the distinction before laid down between an act of the party and the act of God or of the law. And it appears to have been determined, as early as the Year Books, that an incorporeal hereditament once extinguished can be revived only by a new grant: Year Book, 21 Ed. III. 2; 2 Bl. Com. 177. And in the case of *Marvin v. Stone*, 2 Cowen, 807, Judge Sutherland says, "the rule is universal, that when the remedy is suspended by the act of the party entitled to it, it is gone forever": *James v. Morris*, Id. 258.¹ I do not mean that a person will lose a right by merely ceasing to use or exercise it, but he must do some act by which he secures to himself some other thing inconsistent with the enjoyment of the former. In Domat, 218, it is said, "if between two houses, one of which can not be raised so high as to prejudice the prospect of the other, there stands a third house, which, not being liable to the same service, has been raised, and does obstruct the said prospect, the proprietor of the house who owes the service may raise his." The reason is because the privilege has become useless and can not be enjoyed. But if the intervening house chance to be removed the service is recovered. But suppose he who claims the service should put up the intervening house himself, will it then be pretended that he can revive the service by pulling it down? I presume not. Because the obstacle raised by himself was of as permanent a nature as the estate to which the service was due. And in that case, even the accidental falling of the house, much less the pulling of it down, by the party himself, could not restore a right which he had voluntarily relinquished. And here, also, another distinction may be observed, that when a right is suspended by the act of God, as by the drying up of the spring, it will revive again, if the spring chance to flow. But if it be suspended by the act of the party, as by building a house or

1. *James v. Morey*. 2 Cowen, 258 [14 Am. Dec. 475].

wall, it would not be restored even though the obstacle should be removed by a stroke from heaven.

I think, therefore, from these considerations, that the two propositions with which I commenced are most conclusively established: 1. That a servitude is extinguished by any obstruction of a permanent nature by the party himself to whom the service is due (or by his consent), or by the voluntary acquisition or acceptance of any other right or privilege incompatible with the exercise or enjoyment of it; and, 2. That being once lost it is gone forever, and can never be revived but by a new grant. The principle will not apply where the obstruction is for a temporary purpose, even though formed of the most indestructible materials, nor when it is permanent if in aid of the other, even though they cannot be enjoyed at the same time, but must be exercised *alternis visibus*. Thus, for instance, if the creek had been obstructed for the purpose of transporting a single crop across it, or a threshing machine had been erected for the use of the mill; even though the mill must have stood still during its operation, because these would be considered only as different parts of the same system. It is only when, from its nature, the obstruction is permanent, or the use continuous and incompatible, that such a consequence will result. Let us, then, see whether the case now under consideration is of that description.

It will be observed that the stream was entirely obstructed by a dam, so that even the merchant mill was not kept in operation by the water passing down the natural current of the creek. But it was diverted from its natural course into two artificial canals, by which it was conveyed to the respective mills. And it is not pretended that the merchant mill could be kept in operation while the other was supplied with water through the natural channel of the creek. The enjoyment of one, therefore, was incompatible with the use of the other.

Let us now test the principle, by supposing the plaintiff to have erected the same works with the consent of the defendant. Would it not have amounted to a destruction of his right? Most unquestionably; because there would not have been a moment of time when he could have claimed the enjoyment of it. And in that case it will not be pretended that it would be restored by the accidental burning of the mill, or the blowing up of the dam. And is the principle less strong because it is the act of the defendant himself? So far from it, upon every principle of law it operates more forcibly against him.

Hitherto the case has been considered as if between the de-

fendant and Mr. Pinckney, of whom he purchased. But I think it of no unimportant consideration that the present plaintiff was a purchaser for a *bona fide* consideration at the time when the defendant had thus proclaimed to the world that the privilege which he now claims was useless and even incapable of being enjoyed by him.

But it is said the erection of the new building was not incompatible with the enjoyment of the original right, for it was still exercised and enjoyed by raising the water for the purpose of flowing rice. This argument is built on a total misconception of the foundation of the defendant's claim. It assumes for its basis that the defendant had purchased the abstract right of overflowing the plaintiff's land. Now there is no evidence to justify such a proposition. All that can be contended for is, that as he purchased the mill, the pond, dam, etc., passed with it, and that being entitled to the mill, he is entitled to everything that is necessary to the enjoyment of it. Let us then suppose that the mill, dam, pond, etc., with all the right, members, and appurtenances, had been specifically conveyed (and the defendant certainly can not claim more by this deed), what, then, would he have acquired? Why, the right of keeping up the pond for the purposes of the mill, but for no other purpose. Take, for instance, the case put by Domat. If a spring from which a neighbor has a right to fetch water happens to be dried up, he will lose the right to enter on the ground where the spring was: 1 Dom. 106. And for the most obvious reason. The object for which the entry was allowed having ceased, the right ceased with it. Thus, if a person should have a right of way over another's land to church, if the church should happen to be burned, his right of way would cease. Nor would it revive though a theater should be built in the same place. For his right of way was to church, and not to a theater. The raising of the pond for the purpose of flowing the rice, did not arise from any privilege connected with the use of the mill, but from the ownership of the soil, which conferred no right to throw the water back upon the plaintiff's land. And not having been done, in pursuance of the right now set up, can add no strength to the defense. Indeed, the part of the ground where the pond was, having been converted into a rice-field, furnishes additional evidence of an intention to abandon it as a mill-pond.

It is said that the flood-gates were kept up during this whole period; but that is susceptible of the same answer, They were

kept hanging to their hinges. But they were as completely divorced from the mill as if it had been burnt down. Indeed, for the purposes of the question now under consideration, the mill must be considered as entirely annihilated, because it was kept in operation by means unconnected with the pond which is said to have been purchased, and as unconnected with the flood-gates as if they had been placed on the top of the Andes. Raising the water, therefore, occasionally, for the purpose of flowing the rice-field furnishes no evidence of an intention to preserve the original right; but was calculated to authorize a contrary inference, as it was converted to another and different use, entirely distinct from the original object.

In the course of the discussion the words forfeiture, abandonment, and extinguishment have been indiscriminately used. For instance, it has been contended that the defendant has forfeited or abandoned his right, etc. These words have been made the subject of criticism on the other side. It is contended that they relate only to franchises, corporation rights, etc., and that a person can not abandon or forfeit a freehold by mere nonuser. But it will be observed that this is not a question on the construction of an instrument of writing in which the precise definition of words is to be ascertained. Whether the most appropriate terms have been observed throughout the discussion is, therefore, quite unimportant to the main object of our inquiry. But I observe that by the civil law writers these terms and others are indiscriminately used. In the Louisiana code the title of the first chapter on this subject commences: "How servitudes are extinguished." And in enumerating the several methods, the fourth is, by the abandonment of that part of the estate which owes the servitude. Justinian uses the words, *quibus modis finitur*, by what method or in what manner it is terminated: Coop. Just. 468. The language of Heineccius on the Pandects is: "*Quem admodum servitutes amittuntur*," 247. Pothier, in his Digest of the Pandects, makes use of the same language: "*Amittuntur prediales servitutes*," etc.: 4 Pothier, 352. The case, therefore, is not to be determined by a criticism upon words. I have chosen the word, "extinguishment;" whether it is most appropriate or not, I do not know, but it appears to me to be sufficiently intelligible.

But the defendant's counsel are laboring under an error in supposing that the plaintiff claims an abandonment or forfeiture of some part of his freehold, or something incident or belonging to it, neither of which is contended for. The defendant

does not lose or abandon any part of his plantation by changing the use of it; and if he did, the plaintiff would not acquire it. The plaintiff does not claim anything from the defendant. The land overflowed was as much the property of the plaintiff when covered by the defendant's mill pond as it is now. Instead of asking or taking anything from the defendant, he only claims the right of using or enjoying what is his own. The right to overflow the plaintiff's land is not even an incident to the defendant's land, any more than the roundness of a ball is incident to the matter of which it is composed. It is an incidental quality without which it may as well not exist. Drawing off the water does not affect the right of the land any more than cutting a slice from the ball does the matter which enters into its composition. It changes its quality, but may improve its value. That is a matter of which the party himself was alone entitled to judge. The defendant undoubtedly thought he was improving the value of his purchase by abandoning the lower mill and building the other. It was his own act, and the plaintiff only claims the benefit resulting from it.

A servitude is required in this case by the defendant from the plaintiff of overflowing his land. That, says the author above mentioned, may be extinguished "by abandoning that part of the estate which owes the servitude." It was the plaintiff's which owed the servitude, and that the defendant has abandoned. Suppose that instead of a right to overflow his land it was a right of way to his own, and by erecting a mill he had overflowed his own land so that the way had become useless, would it not have amounted to an extinguishment of his right? Is it not in principle the same as the case already mentioned of cutting off the pipe? The defendant has cut off a natural pipe by diverting the water into an artificial one for another and more useful purpose.

So far I have endeavored to support my opinion by authority. But it is said that the common law is nothing more than common sense, or rather that it is the perfection of reason. Let us then consider the case apart from authority, and endeavor to illustrate it by a few cases addressed immediately to the understanding.

Suppose a person to be the owner of a house with ancient lights which no person has a right to obstruct. If he erect a house or put up a wall directly covering his windows, has he not extinguished his light himself as effectually as if he had blowed out his candle? It does not require a reference to Coke,

Justinian, or Domat, to establish that fact. Surely, then, it would amount to a license to his neighbor to put up a similar building on his adjoining lot. Suppose A. to have a right of way over the land of B. If he erect a house on his own land in such a manner as to obstruct the passage into the lands of B., does he not effectually destroy his right of way? Can he claim a right, the enjoyment of which he has rendered impossible by his own act? These cases are so plain that they must be comprehended by every one. Suppose, in the case before us, the defendant, instead of purchasing a mill-pond, with the right of flowing the plaintiff's land, had purchased arable land with a right of way, to haul away his crop. If he had erected the mill which he now has, and thrown the whole of his land under water by converting it into a pond, would he not have destroyed his right of way? Must Mr. Pinckney have kept open a road which terminated at an impassable lake, a way which the owner himself had voluntarily destroyed. It is impossible that such a position can be maintained.

I will put but one other case to show how a right may be extinguished by implication. Suppose General Hampton, instead of purchasing the mill and mill-pond, had purchased the tract of land which Mr. Taylor now owns, would not Mr. Pinckney, by selling that land, have destroyed his own mill? By selling that part of the land with all the rights, members, and appurtenances thereunto belonging without reserving the right of overflowing, he would have impliedly lost the right, because it would be inconsistent with the enjoyment of the thing which he had conveyed. And being once destroyed would never revive but by a new grant. And in what respect does the case now under consideration differ from those to which I have referred? The defendant has, by his own free will and accord, abandoned the privilege to which he was entitled. He has cut away his dam, drawn off the water, and turned his pond into an arable field; he has obstructed the natural current of the creek, and turned it into other channels; he has built a permanent, valuable mill on the land before overflowed by the pond; he has thus relinquished the privilege to which he was entitled, for these new-born privileges of his own creation, the enjoyment of which it is admitted is incompatible with the former state of things. For nine years has the claim now set up been dispensed with, and in all possibility, but for the accidental circumstance of the destruction of the new mill, a revival of it never would have been attempted. Indeed it ought not to be spoken of as a matter of conjecture.

No person in his senses would have erected a merchant-mill in a mill-pond. The very fact of having built on the land previously occupied by the pond carried with it irresistible evidence to all the world that the pond was forever abandoned. And but for the unfortunate destruction of the mill and the blowing up of the dam, the idea of reviving it never would have occurred. But if the defendant's right had not become extinguished, when would it have become so? Might he revive it at any indefinite period? Was the plaintiff bound to wait for fifty years, and leave his plantation a wilderness, while the defendant was trying experiments, converting ponds into rice-fields, and rice-fields into mill-ponds, until he had ascertained the success of all these experiments? This is a question of great public interest, and it is time that it should be settled upon some known and fixed principles. It must be recollected that the plaintiff has rights as well as the defendant, and all he asks is that he should be permitted to enjoy these rights undisturbed. The defendant, having made his election, ought to be bound by it, and in my opinion had no further right to disturb the plaintiff in the full enjoyment of his property. I am satisfied with the verdict both as it regards the law and the facts, and the motion must, therefore, be refused.

New trial refused.

LEE'S HEIRS v. LEE'S EXECUTOR.

[4 McCORD, 183.]

ECCENTRICITY alone will not invalidate a will.

SANITY IS PRESUMED until the contrary is clearly proved.

BELIEF THAT ONE IS TORMENTED BY WITCHES, devils, or evil spirits, is not sufficient evidence of insanity, when the person is otherwise capable of managing his business, particularly when it appears that he was most troubled with these hallucinations when he was drinking.

AVERSION TO RELATIONS is not evidence of insanity where ill treatment is assigned as a reason for it, and there are grounds for believing it well founded.

TO INVALIDATE A WILL there must be extrinsic proof of insanity existing at its execution, or the act must be so irrational as to afford intrinsic evidence of it.

WHERE INSANITY HAS BECOME HABITUAL, all the civil acts of the lunatic are void, whether traceable to his malady or not.

IF AN INTERMISSION OF THE MALADY is shown at the time of performing an act the act is valid, and the habitual insanity of the party will not affect it.

UNJUST WILL is not necessarily an irrational act.

NUMBER, CHARACTER, AND INTELLIGENCE OF WITNESSES, and their opportunities for observation, should be taken into the account upon a question of insanity.

APPEAL from a decision in the circuit court in favor of a certain instrument offered for probate as the will of Mason Lee. The case came before that court on appeal from a decree of the ordinary admitting said will to probate. By the will in question the heirs at law of the testator and his two illegitimate sons were disinherited, and the estate, valued at fifty thousand dollars, was devised to the states of South Carolina and Tennessee, in equal shares. Three other wills had previously been executed by the testator, the provisions in which were identical with those of the one offered for probate, except that in one case the United States were the sole devisees, and in another the states of South Carolina and Georgia. The present will, after giving the property as aforesaid, provided that the testator's slaves should be hired out in Tennessee for twenty-three years, and that at the end of that time the property should be sold, and the proceeds paid into the treasuries of the states named as devisees. It then continued as follows: "Provided, nevertheless, I do not leave my child or children the same or any part thereof, which may be made known by my own handwriting. But in that event, and should they or it die without lawful issue of his, her, or their bodies or body, then to be paid into the treasuries of the states for their benefit and behoof forever. And it is my will and desire that no part of my estate shall be enjoyed or in any wise inherited, by either or any of my relatives, while wood grows or water runs, except as above excepted. And my executors are enjoined to contend with them, either in law or equity, to enforce this my will by employing the best Charleston lawyers, at the expense of my estate; or in any other way, again, again and again. And lastly I do nominate, appoint, and ordain Robison Carloss, Esq., of South Carolina, Marlborough district, one of the executors of this my last will and testament, together with one of the first-rate Baptist ministers belonging to the association of the state of Tennessee. * * * And my executors are again enjoined to contend against any of my relations who may wish to have any of my estate, or to defend this will so long as there is money left to fee the best lawyer in Charleston, or in the above states mentioned."

The ground upon which the will was contested was the insanity of the testator, and the evidence for the heirs tended to

show the following facts: The testator had no particular ground for disliking his relations, with one exception, and his two illegitimate sons had given him no cause of offense, but he had nevertheless come to a settled determination not to make a will in their favor, or in that of any other person, for fear that the legatee might wish for his death. He manifested no aversion, however, to making gifts to his relations, to take effect in his life-time. He believed that his relatives desired his death, and that they used supernatural agency, and bewitched him. He believed that all women were witches, and would not sleep on a bed made by a woman. He believed also that an influence could be exerted on his body and mind from a distance; that some of his relations were in his teeth, and to dislodge them, he had fourteen of his teeth drawn, making no signs of suffering under the operation; that a spell could be cast on him if he should make water on the ground, and, to avoid doing so, he carried a tin cup in his pocket, which he used for that purpose. He had holes cut in his shoes and hat, so that if the devil got in he could drive him out the easier. His dress was coarse and filthy, and was appraised at his death at one dollar. He made his clothes himself. They were without buttons. The pantaloons were like petticoats; they had no waistband, and were fastened by a rope. His great coat was a blanket with a hole cut through it. He did not clean his clothes for months. He kept his head shaved close to prevent the witches from getting hold of his hair, and to make his wits glib. He had many swords, fifteen or twenty a year, and was constantly changing them. One of them was four feet long, with two edges; another eleven inches wide and fourteen long. He had them made by a blacksmith, to enable him to fight the devil and witches. In the daytime he dozed in a hollow gum log for a bed, keeping awake at night fighting the devil and witches. Once he imagined he had the devil nailed up in a fire-place. He made a mark across the room, which he would not pass, or suffer to be swept. Occasionally he would have his negroes throw dirt on his roof to keep away the witches. Once, when within half a day's travel of the end of an important business journey, he abandoned it and returned home, because he heard rats running in the loft of a house where he slept, and thought the witches were after him. At one time, when he had the gravel, he thought some of his relations had bewitched his penis. He believed that he had met and talked with God in the woods, and promised him to live poor and miserable all his

life if he would permit him to get rich. His house at one time was a miserable hovel, adjoining a hog-sty, with a door too low to admit him erect, and containing for a bed a hollow gum log and one or two blankets. In this bed he kept sometimes three or four razors and pistols. He had no chairs, tables or dishes. His meat was boar and bull-beef and dumplings, served in the same pot in which they were boiled, and placed on a chest answering for both table and chair. He ate with a spoon, knife and fork, or with a forked stick, all of which had been cut in two by a blacksmith, a piece taken out, and the remaining parts riveted together, to prevent spells. He would not drink out of a tumbler after another person for fear of harm. His saddle was part of a gum log covered with leather of his own make.

Shortly before his death he went to live with a Mr. Dubose, who would not receive him into his family, but built him a house about twelve feet square. The testator complained that it was too large, and had it pulled down, and a kennel erected in its place three feet wide, five feet long and four feet high, in which he lived.

He was brought up in North Carolina, in decent society, and lived there until thirty years of age, without manifesting any striking peculiarities. According to his own account, he was struck by lightning about that time, and removed to Georgia. Shortly afterwards he began to exhibit the peculiarities which subsequently marked his conduct, and he always manifested a great fear of lightning. In Georgia he killed a negro, and fled the state. He was easily alarmed. Once he was frightened by a wooden clock, thinking it racked his body and mind, and made a contract to buy it and destroy it, but afterwards rescinded the bargain, fearing some greater mischief. His management of his property while in this state was extraordinary. He had his plantation implements made so that the overseers would not use them. He hardly ever appeared at the plantation, but spent his days in dozing, and his nights fighting witches, etc. He would not permit any bull or boar on his plantation to be castrated. He cut off the tails of his hogs and cattle close to the roots. He said the cows made themselves poor fighting flies with their tails, and that if those appendages were cut off the animals would get as fat as squabs. He always cut off the ears of his horses and mules close to their heads. On one occasion he bought a horse at a distance, and immediately cut off its ears, mounted it while bleeding, and rode it home. He hoed his corn after a frost, saying it would come

out green again. His bargains were generally bad. Once he sold a plantation for seven thousand dollars, payable in seventeen years, without interest, with liberty to the purchaser, at the end of the time, to give up the bargain and the land without paying rent; saying that the land would not be worn out, and at the end of seventeen years would be worth ten times as much. At one time shortly before his death he bought a large tract of poor pine land, and set all his negroes to work there, though there was not a house on it. He had two thousand acres partially cleared for the purpose of planting ground-nuts, by which he was to make his fortune, and then abandoned it without planting an acre. He never went to church, voted, did militia, patrol, or road duty, or took any interest in public affairs. All these extravagances and follies he exhibited both when drunk and sober.

One reason which he gave for not providing for one of his illegitimate sons, was that, although he was a twin brother of the other, only one of them was his son; and he said further, that if he left him anything, his relations, the Wigginses, would law him out of it, and that, therefore, he must leave it to the states named in the will, who would be able to defend it. The reason he gave for hiring out the negroes for twenty-three years was that by that time the present generation of his relations would be all dead. When one of his wills was about to be executed he sent many miles for a witness, though there were many competent persons close at hand; and the witness having arrived at nine o'clock, although the will was ready, he would not execute it until assured that it was after twelve o'clock. He had a sulky made at one time, with shafts nine feet long, a square seat and chair, the sticks being worked with a drawing-knife, and not turned, and the cross-bars being made square. He once proposed to build a house four feet wide, with a chimney at the side; and he wanted a coffin made like a seaman's chest, out of two-inch oak plank.

Many respectable witnesses were examined in favor of the will, who thought the testator sane but eccentric, and that his peculiarities of dress, manners, etc., were the result of avarice and affectation. Some thought him intelligent, and even shrewd, when sober, but a fool when drunk; and it was testified that for the purpose of executing his will he kept sober for three weeks beforehand. The attesting witnesses, all respectable men, swore to his capacity at the time of executing the will, and to his keeping sober for the purpose. Being asked

during his last illness if he believed in witchcraft, he replied that he was not so credulous as to believe any such thing; that he knew his disease was the gravel, and would cause his death. He frequently declared that the Wigginses, his relations, should have none of his property, and that he believed one of them was at the head of a plot to seize him and take him to Georgia to be tried for killing the negro before mentioned. One witness, whose character, however, was attacked, swore that this belief was founded upon fact, and that the plot was prevented by the testator's discovery of it. The testator said he would leave his illegitimate son property but for the fact that he would not be able to defend it from the Wigginses. His attorney, a gentleman of intelligence, and the son whom he acknowledged, both swore that they believed him sane when he was sober. When young he had been an accountant, and some well-executed papers drawn by him were exhibited in evidence. It appeared that Wiggins, the appellant, had on one occasion appointed him his attorney in fact, and had sold him a number of negroes.

WATIES, J., charged the jury that the peculiar nature of the case made it one of great difficulty and some doubt. The issue between the parties was whether the testator, Mason Lee, was of sound mind or not, at the time he executed his will. The evidence consisted partly of examinations taken under commissions, and partly of oral testimony. The first is of witnesses in North Carolina, who described the early habits and conduct of the testator to have been generally as regular and correct as those of other young men, although manifesting occasionally some singularity; also of witnesses in Georgia (to which state he afterwards removed), who testified that his mind and conduct had then undergone a great change, and betrayed strong marks of derangement. The witnesses who have been examined in court give a detailed account of his life from the time he came into this state until his death. The counsel for the appellant rest their allegation of his insanity on the following grounds: 1. His belief in witchcraft, and a supernatural agency; 2. His eccentric habits; and, 3. His aversion to his relations. His honor was of opinion that a belief in witchcraft, although sometimes the symptom of a disordered mind, was not of itself any proof of it, as it had often been entertained by persons who were above all suspicion of insanity, and even by men who were distinguished for their wisdom. He thought, also, that

the eccentricities of the testator might be traced to other causes than insanity. They exhibited indeed singular instances of personal privation, and of a distempered imagination. He was filthy in his dress, slept in a hollow gum, ate out of a pot with a broken spoon, and had no furniture in his house. He imagined himself engaged in a constant warfare with evil spirits, complained of their incessant assaults, and provided the strangest weapons for his defense. Such conduct, if it stood alone, might very well be called insanity, but it appeared that he was most distracted with those phantoms when he was drinking a great quantity of ardent spirits, and that he was disposed at all times to be intemperate. It was proved too, by a great number of respectable witnesses, that when sober he conversed sensibly on most subjects; that they regarded him as a very singular man, but not insane; that he made frequent contracts, many of which were to a considerable extent, and although some of them were whimsical, yet the result was generally advantageous to him; and these witnesses were all of opinion that he was perfectly competent to manage and dispose of his property. It was an important fact that the appellant, Wiggins, had himself sold to him a number of negroes, and on leaving the state on some occasion had so much confidence in his discretion and judgment, that he had appointed him his attorney to manage his affairs in his absence.

The third ground relied on to show insanity was the aversion of the testator to his relations. This fact was fully proved, and if his relations had lived in friendly intercourse with him, and he had excluded them all from his will without any cause, it might have been considered a strong indication of a perverted mind; but he assigned reasons for this exclusion, some of which appeared to be well founded and to justify his belief that they had treated him ill, and particularly that Wiggins had conspired with others to have him seized and carried to Georgia, to answer to a criminal charge in that state. He did not, therefore, regard his aversion to his relations, under these circumstances, as any evidence of insanity.

But the main question in the case was whether the testator was insane at the time of making his will. This was the issue to be tried, and he stated to the jury that the will could only be invalidated by proof of an existing insanity at the time of making it, or by its being so irrational an act as to afford intrinsic evidence of this. If a man had been found a lunatic, or might be considered so in the legal sense of the word (that is, *non*

compos mentis), all his civil acts were void whether they could be traced to the malady or not, because his insanity has become a habitual state. But it was not (as was said by Lord Erskine in his celebrated speech for Hadfield) every man of a frantic appearance and behavior who is to be considered a lunatic, either as it regards obligations or crimes, but he must appear to the jury *non compos mentis*, not at the anterior period, but at the moment when the act was done: Coop. Med. Jurisp. 396. In the case of *Cartwright v. Cartwright*, 1 Phil. 100, this doctrine was carried still further. "If (it was there stated by the court) you can establish that a party habitually afflicted by the malady of the mind has intermissions, and if there was an intermission at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it." Having presented to the jury these views of the law, he proceeded to consider the evidence which related more immediately to the making and execution of the will, and which he thought of most importance.

It appeared to him to bring the testator's case fully within the law before stated. The will was drawn by his direction, was transcribed from one which he had formally dictated, and was consistent with the previous and repeated declarations of his intention. He abstained from drinking any ardent spirits for two weeks before he executed it, that he might keep his mind collected for the purpose. The person who drew the will, and the witnesses to the execution of it, all deposed to the perfect soundness of his mind at the time; and during his last illness, which soon after ensued, on its being suggested to him in jest that he might be troubled by witches, he replied "that he was not so credulous as to believe any such thing; that he knew his disease was the gravel, and that it would be the death of him." There was so much deliberation and thought in all this, that even if the testator had been before afflicted with habitual insanity, yet this conduct was sufficient to establish a complete intermission. But it was contended that the will itself spake the language of insanity. It could not be denied that it was a strange will, and if not the production of an insane mind, it was no doubt that of a very eccentric one. It might be regarded too as unjust to his illegitimate sons, if not to his other relations. But it was not, therefore, an irrational act in a legal sense, nor was it so eccentric or unjust as many other wills which had been made by men of unquestionable sanity. It was not as much so in either respect as the will of Thelusson,

who had deprived his children and grandchildren of nearly all the enjoyments of his immense estate, that it might accumulate for the benefit of a contingent and remote descendant who might never come into existence, and if he should not, for the benefit of the sinking fund of Great Britain. But his will was allowed to stand, because the law puts no restriction on a man's right to dispose of his property in any way in which his partialities or pride, or even caprice, may prompt him, if he does not infringe any rule of policy. In the present case, the testator appeared to have the double design of showing his resentment to his relations, and of indulging in the ambitious vanity of having himself recognized by the states of South Carolina and Tennessee as their benefactor. He concluded his observations by stating to the jury that in exercising their own judgment on this difficult and mysterious subject, if the testator was not proved to be insane by full and unequivocal evidence, they were bound to find in favor of his sanity. A rational state of mind is the natural state of every man, and until there is full proof of insanity the law presumes that every man is in a rational state when he does any act, either civil or criminal. He further stated that in weighing the testimony the jury ought to take into consideration the number and character of witnesses; and it appeared that of those who thought the testator insane the most material of them were his overseers, who only witnessed his conduct at home, when he was under the excitement of continual intoxication; on the other hand, that the witnesses who testified to his sanity were more in number, longer and more intimately acquainted with him, and from their education and condition in life must have had more discernment, and were better qualified to judge of the true state and character of his mind.

The jury found a verdict in favor of the will, and the heirs at law appealed.

Ervin, Blanding and Harper, for the appellants, opposed probate of the will on the ground of the testator's partial insanity, as exhibited by his delusion and hatred with respect to his relations, and relied chiefly on Lord Erskine's argument, in *Hadfield's case*.

Evans and Preston, contra, insisted: 1. That the appellants had shown at most only a case of great eccentricity, and not of insanity; 2. That if insanity had been shown, a lucid interval at the time of executing the will had been proved. They relied

upon *Cartwright v. Cartwright*, 1 Phillim. 90; *White v. Driver*, Id. 84; *Kinleside v. Harrison*, 2 Id. 454; *Greenwood's case*, cited in *White v. Wilson*, 13 Ves. 49; *Faulder v. Silk*, 1 Coll. on Idiots, 390.

By Court, NOTT, J. There does not appear to be any such error in the charge of the presiding judge in this case as calls for the interposition of this court. It was a mixed case of law and fact, and both were fairly and correctly submitted to the consideration of the jury. And the evidence seems very well to have authorized the verdict which they have found. The motion is therefore refused.

New trial refused.

INSANITY AFFECTING CAPACITY TO CONTRACT.—See on this subject the note to *Jackson v. King*, 15 Am. Dec. 361; see also, *Owings' case*, ante, 311, and note.

INSANITY AFFECTING TESTAMENTARY CAPACITY.—A testator will be presumed sane until the contrary is proved, but when mental derangement is once shown, the burden is on the devisee or legatee to prove a lucid interval. *Jackson v. Van Dusen*, 4 Am. Dec. 330. Incapacity may be inferred from facts and circumstances both anterior and subsequent to the execution of the will, where there is no evidence of it at the time and the subscribing witnesses are uncontradicted: *Irish v. Smith*, 11 Am. Dec. 648.

GREIR v. TAYLOR.

[4 McCORD, 206.]

PROHIBITION TO RESTRAIN A GOVERNOR from issuing a commission to an officer because of irregularity in his election, will not lie.

MOTION made before Bay, J., for a prohibition to restrain the governor from issuing a commission to one Thurston, the relator's competitor for the office of sheriff, the said Thurston having been declared elected. The ground of the motion was that the election was irregular.

BAY, J. As this is an entire new case, out of the routine of the ordinary cases in which prohibitions have been usually granted, there are no authorities in the books to aid me, or throw any light on the subject; I am, therefore, obliged to resort to principles to bear me out in the opinion which I must give on this application. In England, the king is said to be the fountain of all power and authority in that kingdom. All the courts and judges in his dominions derive their jurisdiction, and exercise their respective functions, from him and under his name.

Hence, it has resulted from his supremacy that the judges of his superior courts of law, although they have the power to keep all the inferior tribunals and officers in the kingdom within their proper limits, and to prevent them from exercising jurisdiction in cases not belonging to them, yet they have no power to restrain the king from the exercise of any of the prerogatives or authorities appertaining to or belonging to the crown. A prohibition is a high prerogative writ proceeding from the king himself, and emanating from him; it would, therefore, be a solecism to send such a writ to restrain him who is omnipotent in such cases, and whose authority is underived from any other power on earth. Such a proceeding, therefore, would be something like sending out a process to restrain himself, which would be absurd and nugatory in its very nature. In our country, the people are supreme. All civil power and authority is derived from them, and by virtue of their inherent prerogatives, they have thought proper, in order to establish justice and to prevent all irregularity and confusion, to make known and publish to the world their great republican charter, called a constitution, by which all the powers of the state are regulated and governed.

By this constitution, all the powers of the government are distinctly defined and vested in their separate branches, namely, the legislative, the judicial, and the executive, all of which are independent of, and have no control over, each other. The legislative branch has the power of making and enacting all laws for the government of the citizens. The judicial has the power of construing those laws so made, and of declaring their bearings on the citizens, and the executive is charged with the authority and power of causing all those laws to be duly executed, and of granting commissions to all the officers of government for the exercise of their respective functions in office for the benefit of the whole. But no one of these different departments has the right to interfere with the others in the legal execution of their official duties. It is admitted that the judges of the superior courts of law, in the exercise of their judicial powers, have a right, by the common law of the land, which is recognized by the constitution, to send out this high prerogative writ to restrain all the inferior courts and jurisdictions, or bodies of men appointed for special purposes, from doing illegal or unauthorized acts. But they have no power or authority to send out such a writ to either of the other great branches of the government; for if they had such a power to invade the province of the executive, and to say he shall not

exercise his official right of issuing commissions, etc., it is difficult to see any good reason why they should not send the same writ to the other great branch of the government to restrain it from passing any law which they might conceive was an impolitic or unconstitutional act. Thus, such a doctrine would be laying the foundation for a scene of confusion and clashing of jurisdictions, as would, in a very limited period, destroy our present happy and well-poised government, the idea of which can not for a moment be tolerated. For these reasons, I am clearly of opinion that the writ of prohibition will not lie in any case against his excellency, the governor of the state, to restrain him in any of the powers given him by the constitution.

Let the suggestion, therefore, be dismissed.

From this decision the relator appealed.

Wilson, for the relator, claimed that in issuing a commission to an elected officer, the governor acts merely in a ministerial capacity, and is subject to the control of the court.

Porter and Petigru, contra, said it would be establishing a dangerous precedent for the court to assume the right to control one of the co-ordinate branches of the government.

By Court, *Norr, J.* It is unnecessary to add anything in this case to the opinion which has been expressed by the judge to whom the application was originally made. I will, nevertheless, observe, that a constitution has been defined to be "a form of government delineated by the mighty hand of the people." It establishes the different branches of the government, and assigns to them their respective duties and powers. By the constitution of South Carolina they are rendered co-ordinate and independent. Neither can control the other in the exercise of its legitimate functions. To the judges belongs the power of expounding the laws; and although in the discharge of that duty they may render a law inoperative by declaring it unconstitutional, it does not arise from any supremacy which the judiciary possesses over the legislature, but from the supremacy of the constitution over both. Whenever, therefore, an act of the legislature comes in contact with the constitution, the latter must prevail. But the judges have no power to restrain the legislature from passing an unconstitutional law, nor to restrain the governor from carrying such a law into execution. For such abuse of power they are answerable only to the sovereign

people. I concur, therefore, in the opinion which has been given, that the prohibition ought not to have been granted.

Prohibition refused.

PROHIBITION, WHEN IT LIES.—This subject is discussed at considerable length in the note to *State v. Commissioners of Roads*, 12 Am. Dec. 604.

DUNCAN v. HODGES.

[4 McCORD, 239.]

BLANK SIGNED, SEALED, AND DELIVERED and afterwards filled up is no deed.

DEED MADE OUT IN BLANK and afterwards filled up and delivered by the grantor's agent is valid.

PERSONAL DELIVERY IS UNNECESSARY; it may be made by another by the grantor's appointment or authority precedent, or by his subsequent assent or agreement.

DEED INFORMALLY EXECUTED AND DELIVERED will be made good by the grantor subsequently accepting and claiming the benefit of the contract growing out of it.

ACTION on a bond given for the purchase-money of certain land. The defense was that the deed conveying the land was void, because the grantor and the subscribing witnesses were not present when it was filled up and delivered. It appeared that the deed was duly signed and sealed in blank by the plaintiff, and attested by two witnesses, and left with an agent to be filled up and delivered to the defendant when the bond for the purchase-money was executed. The bond now sued on having been prepared, the plaintiff's agent filled up the blanks in the deed, and delivered it to the defendant, who accepted it, and gave the said bond in return. The judge at the trial below charged in favor of the defendant, who accordingly obtained a verdict. The plaintiff appealed.

Noble, for the appellant, cited 2 Bl. Com. 307; Com. Dig. Fait A (1).

McCraven, *contra*, referred to *Boyd v. Boyd*, 2 Nott & McC. 125; 1 Shep. Touch. 59.

By Court, JOHNSON, J. The general rule is, that if a blank be signed, sealed and delivered, and afterwards written, it is no deed, and the obvious reason is, that as there was nothing of substance contained in it, nothing could pass by it. But the rule never was intended to prescribe to the grantor the order of

time in which the several parts of a deed should be written. A thing to be granted, or person to whom, and the sealing and delivering, are some of those which are necessary, and the whole is consummated by the delivery; and if the grantor should think proper to reverse this order in the manner of execution, but in the end makes it perfect, before the delivery, it is a good deed. Thus it is said that if a deed be made with blanks, and afterwards filled up and delivered by the agent of the party, it is good: Anst. 229; Com. Dig. tit. Fait A. (1), note (f.) Day's ed. It is not pretended that this deed was not perfect as to form at the time it was delivered by Gray, the plaintiff's agent; or that he was not instructed by the plaintiffs to fill up the blanks and deliver it. And according to this authority, the deed is good. In another view I think the same consequences follow. It is not necessary, in all cases, that the grantor should, in person, make delivery of the deed. It may, says Sheppard, be delivered by another, by his appointment, or authority precedent, or assent or agreement subsequent; for *omnis ratihabitio mandato æquiparatur*: 1 Shep. Touch. 57. And admitting that the deed, on account of the manner of its execution and the informality of the delivery, was void, yet the plaintiff is bound by his subsequent assent to the execution, manifested by his accepting and claiming the benefit of the contract growing out of it, and he will not be permitted to gainsay or controvert it. It would be a fraud on the defendant which could not be tolerated.

New trial granted.

FILLING BLANKS IN INSTRUMENT AFTER EXECUTION.—This subject, in its different phases, is discussed in the notes to *Woodworth v. Bank of America*, 10 Am. Dec. 271; *Stahl v. Berger*, 13 Id. 669; *Whitehurst v. Hickey*, 15 Id. 171.

SUBSEQUENT RATIFICATION OF DEED.—A void deed by a *feme covert* may be delivered and ratified after the husband's death, of which parol evidence is admissible: *Jourdan v. Jourdan*, 11 Am. Dec. 724.

CHESHIRE v. BARRETT.

[4 McCORD, 241.]

INFANT'S CONTRACTS are either void or voidable.

VOIDABLE CONTRACTS OF AN INFANT impose a qualified obligation, and their performance will be enforced if the infant after attaining his majority elects to be bound thereby.

SLIGHT CIRCUMSTANCES DEMONSTRATING AN INFANT'S ASSENT to a contract after coming of age will bind him.

INFANT'S CONTINUANCE IN POSSESSION of land purchased or leased, after attaining his majority, will confirm the contract.

ANY WORD OR ACTION from which assent may fairly be deduced will be regarded as confirmation.

RETAINING AND USING A HORSE purchased during infancy, after attaining majority, affirms the purchase.

INFANT'S NOTE PAYABLE TO BEARER, given as the consideration for a purchase which has been confirmed on coming of age, will support an action by the bearer, for the confirmation extends to the entire contract.

SUMMARY process on a note. Plea, infancy. It appeared that the note was given for a horse purchased by the defendant while an infant, but that said horse was kept, used, and finally sold by him after coming of age. The note was payable to bearer and was sold and transferred to the plaintiff by the original payee. The plaintiff insisted that the contract had been confirmed by the acts of the defendant. The defendant denied this, and claimed, also, that in any case the confirmation would not avail the plaintiff, because he was not a party to the contract. Plaintiff was nonsuited and appealed.

Bauskett and Dunlap, for the plaintiff, cited 3 Bac. Ab. tit. Infancy (i.); 2 Vern. 228; 4 Cruise art. 3, tit. 32, ch. 8, sec. 7.

O'Neill and Johnston, contra.

By court, **JOHNSON, J.**: The first ground of this motion necessarily involves two distinct propositions; first, whether this is such a contract that the defendant could bind himself to perform it by a reassumption after he attained full age; and, secondly, whether the act done amounted to a reassumption.

The supposed incapacity of infants to judge of the value of property, or its fitness for their use, and the danger to which they are exposed from the arts and devices of bad men, is the foundation of the rule which exempts them from liability on contracts made by them during infancy. But when they have attained full age, and are capable of exercising a matured judgment in the review of past transactions, they may, without violation of the principle, be permitted to affirm or disaffirm their contracts. They are then supposed to be competent to determine how far these contracts have been beneficial, and how far injurious; and having made the election to be bound or not, the law in most cases will confirm and enforce it; and keeping this principle in view, I will proceed to the investigation of the first proposition.

Contracts entered into by infants are classed into those that are absolutely void, and those that are voidable. With respect

to the former, it is very clear that no subsequent confirmation short of actual performance can bind, for the obvious reason that a void contract imposes no obligation; and it being itself, without foundation, no superstructure can be raised upon it. Those which are voidable only, are, in law, supposed to impose a qualified obligation; and having elected to be bound by it, the performance will be enforced. In all cases of this sort, it is, therefore, a primary consideration to determine to which of these classes the contract belongs. The rules extracted by Bingham, in his treatise on the Law of Infancy, 67, are, that all gifts, grants, or deeds made by infants, which do not take effect by the delivery of his hand, are void, but that all gifts, grants, or deeds made by him by deed or matter in writing, and to take effect by delivery of his hand, are voidable only; 2. That those acts are void in which there is no semblance of benefit to the infant. Those from which he may receive a benefit are voidable only. But he demonstrates, I think, very clearly, by illustrations drawn from decided cases, that the first of these rules is not sufficiently extensive for practical use and general application, as it embraces only a limited class of contracts; and it is apparent that the latter could not stand with it; for if a gift, grant, or deed is voidable only because it takes effect by delivery, then the circumstance whether he did or did not derive a benefit from it must be unimportant; and he comes to the conclusion, in which I am much disposed to concur, that "perhaps it may not be unsuccessfully contended at this day that few, if any, of the contracts of infants are absolutely void."

Judge Reeve, in his treatise on Domestic Relations, 250, has, I think, in some degree supplied the deficiency of the old rules on this subject. He proceeds on the principle that this protection is a privilege to the infant, and that his contracts must be so regarded as to give him the full benefit of them, and if he cannot have it without their being regarded as utterly void, then it would be so considered. And he illustrates this rule by a case from Keeble, where a barber contracted with an infant for all the hair on her head, and in pursuance of the contract, with her consent cut it off; and it was, notwithstanding, held that she might maintain an action for forcibly cutting the hair from her head. Here it would seem that both the contract and the consent must be regarded as void, to enable him to maintain the action. Yet I am unable to perceive any reason why

she might not have been bound by her affirmation of this contract after she came of full age.

In the pursuit of this inquiry we are met by the dictum that if one deliver goods to an infant, on a contract to sell, etc., such delivery is in law regarded as a gift, because it is said an infant is incapable of making any contract. Bac. Abr. tit. Infancy, I, 3. Hence it is concluded that such contracts are not only voidable but absolutely void, and that any confirmation or reassumption of the promise to pay is void for want of consideration. I should be wanting in candor if I pretended to supply from my own resources anything in addition to the very able and conclusive arguments of Judge Reeve on this question, in which he demonstrates most clearly that the *dictum* is unsupported by reason or authorities. "It is absurd to reason that a man who consented to part with his property for a stipulated price, intended it as a voluntary gift;" and it is believed that the contradictions and the confusion in the authorities on the question have arisen in pursuing this doctrine, and at the same time laboring to get rid of it. The result of my own reflections, after a good deal of labor bestowed on the subject, is that, in general, there is but little distinction in this respect between contracts entered into by adults and infants. Contracts immoral in their tendency, or against law, or without consideration, are void by whomsoever they may be made, and no undertaking based upon them can bind. Those based upon a moral, legal, and valuable consideration, bind adults. The policy of the law permits an infant to avoid them; but if, after arriving at full age, he thinks proper to affirm them, he ought to be bound. The moral obligation is sufficient consideration to support the new undertaking. A power delegated by an infant is said to be an exception; but when the ingredients of a binding contract have entered into the new undertaking, I am reluctant to admit even this exception.

The case of *Counts v. Bates*, Harper, 464, relied on by the counsel opposed to the motion, is not inconsistent with this conclusion. In that case there had been no confirmation of the contract by the infant. The defendant, his administrator, was not competent to make or affirm a contract for him. He could not bind the estate by any contract of his. In making the contract, the plaintiff took upon himself the risk of a subsequent confirmation, and was bound to abide by the result. No injustice consistent [inconsistent] with the protection which the law allows to infants was done to him. The rules, with respect to what shall

amount to a confirmation of a contract made by an infant, after he attains full age, are better ascertained. A very slight circumstance demonstrating his assent will bind him; or any act by which his assent is manifested. Thus, if an infant purchase land, and continue in possession after he attains full age, it will be regarded as a confirmation of the purchase: 1 Salk. 20; 4 East, 599; or if he make exchange of lands: Co. Lit. 26; or if he take a lease rendering rent, and continue in possession several years after he comes of age, it is a confirmation of the contract *ab initio*, and he is bound for the rent in arrear: Cro. Jac. 324. In short, any word or action from which his assent to the contract may fairly be deduced, will be regarded as a confirmation. In the case under consideration, the undertaking of the defendant was founded on a valuable consideration. He derived a positive benefit from it. He might have availed himself fully of the protection to which he was entitled as an infant, by disaffirming the contract, and restoring the horse to the plaintiff; but he thought proper to retain and use him, and in the end to sell him and pocket the proceeds. It was a contract which, according to the foregoing view, he was competent to confirm, and his conduct amounted to a confirmation. The plaintiff was, therefore, entitled to recover.

On the remaining ground of this motion there can, I think, be no difficulty. The undertaking to pay to bearer constituted a part of the original contract. The act of confirmation was general, and extended to the entire contract, and must be regarded as having relation back to its origin, as well in effect as in form. The action was, therefore, well brought in the name of the present plaintiff.

Decree reversed.

INFANT'S CONTRACTS, WHEN VOID AND WHEN VOIDABLE.—See on this point: *Conroe v. Birdsall*, 1 Am. Dec. 105; *Oliver v. Houdlet*, 7 Id. 134, and note; *Phillips v. Green*, 13 Id. 124.

RATIFICATION OF INFANT'S CONTRACTS.—As to what constitutes a ratification by an infant of his voidable contract after coming of age, see: *Rogers v. Hurd*, 4 Am. Dec. 182, and note; *Martin v. Mayo*, 6 Id. 103; *Whitney v. Dutch*, 7 Id. 229, and note. Concerning an infant's ratification of his guardian's contract settling a boundary, after coming of age, see: *Brown v. Caldwell*, 13 Id. 660. On coming of age, an infant may be compelled to elect whether he will ratify a previous contract with an adult as a whole, or abandon all rights and pretensions under it: *Overbach v. Heermance*, 14 Id. 546.

BYRD v. BOYD.

[4 McCORD, 246.]

SERVANT'S CONTRACT NOT APPORTIONABLE.—The rule of the English cases is that a servant prevented by his master's misconduct from performing his contract, is entitled to the stipulated wages for the whole time, and that, on the other hand, he is entitled to nothing if he leaves the service voluntarily.

PLANTER DISCHARGING HIS OVERSEER WITHOUT CAUSE, at a season of the year when it is impracticable to find employment, so that his whole time is lost, is liable for the overseer's wages for the whole year.

OVERSEER CAUSELESSLY ABANDONING HIS EMPLOYER, or, by his neglect, occasioning a loss commensurate with his services, is entitled to nothing.

EMPLOYER HAVING REAPED THE FULL BENEFIT of services rendered by his overseer, and finding it necessary and justifiable to discharge him from circumstances unconnected with the contract, is liable for compensation for services so rendered.

ACTION by an overseer for wages for a year on a written contract, to pay a certain sum for the year. The plaintiff, it appeared, managed the crop well, but was discharged in July, for using abusive language to the defendant's daughter. The judge below charged the jury that the contract was for the entire year, and that if the plaintiff was properly discharged, he was entitled to nothing; but that if the discharge was not proper, he should recover the whole amount. Verdict for the plaintiff, and the defendant appealed.

Simpson and Dunlap, for the appellant.

Farrow and Irby, contra.

By Court, JOHNSON, J. The only ground necessary to be considered in this case is the supposed misdirection of the presiding judge in charging the jury that they were not at liberty, under any circumstances, to apportion the compensation of the plaintiff to the services actually rendered, and that they were bound to allow him the stipulated wages for the year, or nothing. I have found it very difficult to reconcile the cases on this subject, or to extract from them any satisfactory and well-defined rule. The English cases go very far in establishing that contracts, particularly with servants and seamen, can not be apportioned, and that the performance of the service is a condition precedent to the payment of wages, and they result in the rule that when they are prevented from performing it by the misconduct of the master, they are entitled to the stipulated wages for the whole time, and *e converso*, they are

entitled to nothing if they abandon service voluntarily. And yet the rule has been so far relaxed as to entitle the master to a deduction of any sum which a seaman may have earned in another vessel in the mean time: Abbot, 392; 1 Com. on Cont. 362. This rule is evidently the result of expediency, especially as applied to seamen; and it becomes a question of some importance how far it is applicable to the subject under consideration. The relation of employer and overseer is one which the state of the country renders almost indispensably necessary to every planter, and collisions do and must necessarily arise, and it is fit that there should be some settled rule on the subject. Where the employer wantonly and without cause turns off his overseer, at a season of the year when it would be impracticable to get employment elsewhere, and his time is wholly lost, I should feel no hesitation in enforcing the rule rigidly, not only as a punishment but as a just remuneration to the overseer; and so when the overseer abandons the employer without cause, or by his neglect inflicts a loss on him commensurate with the services which he has performed, he clearly deserves no compensation.

There is, however, a third class of cases for which it is necessary to provide, and which are, perhaps, of the most common occurrence. They are those where the employer reaps the full benefit of the services which have been rendered, but some circumstance occurs which renders his discharging the overseer necessary and justifiable, and that perhaps not immediately connected with the contract, as in the present case. It happens frequently, too, that it becomes a question of great difficulty to ascertain with whom the first wrong commenced. I can not reconcile it to my notions of natural justice, that the overseer should not recover a compensation for the services, so far as they were directed, and which have been beneficial to the employer. And I am unable to discover any evil which is likely to result from submitting such a matter to the sound discretion of a jury of the country. And as a matter of expediency I should be disposed to establish it as a rule.

This conclusion is, I think, supported by the principle of the exception before noticed, and by the common case in which a party is permitted to prove, by way of defense, that owing to some defect in the execution of the work and labor done and performed, the thing is not worth as much as was stipulated for; and the still more comprehensive principle, that a partial failure of consideration is a good ground of defense. Cases of

this description are of very frequent occurrence, and although this question has never been judicially determined, it may be clearly collected from them that the pervading opinion is favorable to an apportionment. In some cases the jury have found the entire sum, but in most they have apportioned it when the circumstances justified it. Yet the point has never been adverted to by the bench or the bar: *Vide Crawford v. Davis*, 2 Const. Rep. 403;¹ *Clancy v. Robinson*, Id.;² and *Connelly v. Irby*, except in the case of *Cox v. Adams*, 1 Nott & McCord, 284, which is relied on in opposition to the motion. But by referring to that case it will be found that the question was not made, nor is there even a dictum in relation to it.

I am of opinion, therefore, that the case should go back on the ground of misdirection, unbiased by any opinion of the court as to the facts, and it is ordered accordingly.

New trial granted.

ENTIRE CONTRACT FOR SERVICES must be fully performed by the person employed before he can maintain an action thereon: *McMillan v. Vanderlip*, 7 Am. Dec. 299, and note; *Jennings v. Camp*, Id. 367; *Stark v. Parker*, 13 Id. 425.

GIVENS v. HIGGINS.

[4 McCORD, 286.]

EXECUTOR DE SON TORT.—Any intermeddling with the estate of a decedent, as by collecting money, paying debts, or the like, renders one executor *de son tort*.

DOCTRINE OF THE EARLY CASES was more stringent than that now held.

INTERMEDDLING MUST BE SUCH as to manifest a right to control or dispose of the effects of the deceased.

ACTING AS SERVANT to another will not make one liable as executor *de son tort*.

WIDOW'S OVERSEER OR AGENT collecting or disbursing funds of the estate, as such, does not become executor *de son tort* of the deceased husband.

ACTION against the defendant as executor *de son tort* of Robert Givens, deceased, to recover a claim against the said Givens. The evidence by which it was sought to charge the defendant as executor *de son tort* was to the effect that after Givens' death, he, the defendant, had removed the effects about five miles, had paid a debt with some of the property, and had been seen occasionally using a horse belonging to the estate. The defendant proved that the acts mentioned were performed by

1. *Davis v. Crawford*, 2 Const. R. (S. C.) 403.

2. *Clancy v. Robertson*, 2 Const. R. (S. C.) 404.

direction of the deceased's widow, who was ill when her husband died. The court below held that these acts were not sufficient to make the defendant liable as executor *de son tort*. Verdict for the defendant. Motion for a new trial.

Hill, for the motion.

Williams, *contra*.

By Court, NORR, J. There is no doubt that any intermeddling with the estate of a deceased person, such as collecting money, paying debts with the funds of the estate, or making any other disposition of any part of the property, will make a person an executor in his own wrong. In some of the old cases the doctrine has been carried to an extravagant, and, I may say, even to a ridiculous extent. A person has been held liable as executor in his own wrong for taking a dog, and a wife for milking the cow of her deceased husband: *Genet v. Carpenter*, 2 Dyer, 166,¹ in note. But such a principle certainly would not be sustained at this day.

The intermeddling must be such as to manifest a right to exercise a control or make a disposition of the effects of the deceased. Acting merely as a servant, will not make a person so liable, *per Buller, J.*, in *Padget and another v. Priest and Porter*, 2 Term R. 97. Nor where one is made co-adjutor or supervisor: *Stokes v. Porter*, 2 Dyer, 166. Thus, for instance, if a widow should employ an overseer to superintend the plantation of her husband, a wagoner or boatman to carry the crop to market, a factor to sell it, and a clerk to collect and pay away money under her direction, these several persons, not knowing in what character he was acting, would be considered merely as her agents, and not as exercising such control over the funds of the estate as to make themselves liable. And such appears to be the characters in which this defendant acted. He acted merely as the agent of the widow. He did not pretend to have any control over the property, and knew not probably to whom it belonged. I concur, therefore, with the presiding judge, and am of opinion that the motion ought to be refused.

New trial refused.

EXECUTOR DE SON TORT, WHO IS. See, on this point, *Turner v. Child*, *ante*, 555, and the note thereto.

1. *Garret v. Carpenter*, 2 Dyer, 166, in note.

HUDNAL v. WILDER.

[4 McCORD, 294.]

STATUTES OF 13 AND 27 ELIZ. against fraudulent conveyances are merely declaratory of the common law.

THE INTENT WITH WHICH A DEED IS MADE, and not the act of voluntarily conveying, renders it void.

VOLUNTARY DISPOSITION OF ARTICLES OF NECESSITY in habitual use, such as household furniture, provisions, and the like, will inevitably excite a suspicion of fraud.

VOLUNTARY DEED BY ONE LARGELY INDEBTED is void against existing creditors, as a conclusion of law.

VOLUNTARY DEED IS FRAUDULENT AGAINST A SUBSEQUENT PURCHASER, if intended to secure the property from the reach of creditors.

BETWEEN THE PARTIES a voluntary deed is always good.

PAYMENT OF DEBTS WILL CURE A DEED fraudulent against creditors; but it will not affect the rights of a subsequent purchaser if the circumstances authorize a belief that no change of property was actually intended, but that the property was to revert to the donor when the debts were paid.

ENGLISH DECISIONS UNDER 27 ELIZ. hold that a subsequent *bona fide* purchaser, even with notice, shall prevail against a prior voluntary donee.

IN CASES OF PERSONALTY AS WELL AS REALTY a *bona fide* sale without notice must prevail against a prior voluntary deed.

VENDOR IN POSSESSION is considered the owner as to creditors and subsequent purchasers against the most solemn conveyance to a *bona fide* purchaser not in possession.

PURCHASER FROM A TRUSTEE without notice, holds the property discharged of the trust.

PRESUMPTION OF FRAUD FROM THE DONOR'S POSSESSION under a trust deed, made as a provision for one of the family, may be repelled, where the property and its proceeds are kept for the donee's separate use and benefit; but not so where the donor uses it as his own, and for his own benefit, and the gift is evidenced only by parol, or by a deed in the donor's possession.

IF A VOLUNTARY GIFT BE ACTUALLY FRAUDULENT, notice to the subsequent purchaser can not do away the fraud.

PURCHASER WITH NOTICE OF A VOLUNTARY DEED in favor of one of the donor's family can not be relieved.

TROVER for a negro slave named Frank. On a new trial, after the former decision of this court in the cause: 1 McCord, 227, it appeared that one Norris, who formerly owned the slave, conveyed him, February 13, 1809, with other property, real and personal, to the plaintiff in trust for the use of the grantor's wife for life, remainder to his children then living, remainder to himself, the said Norris being at the time much in debt. In 1815, one Ricks obtained judgment against Norris for three hundred dollars in an action begun in July, 1810, for a debt

due before the deed was made to the plaintiff, and Norris took the benefit of the prison bounds act. On a bill filed by Ricks against Norris and the present plaintiff, the court ordered that enough of the property conveyed by Norris to the plaintiff should be sold to satisfy Ricks' execution; which was done, and the balance paid over to the plaintiff as trustee. In 1814, the lands contained in the deed to the plaintiff was sold under another execution for thirty-seven dollars, and bought by the present plaintiff. The negro now sued for was sold in 1815, on still another execution against Norris, which was for twenty dollars, and was bought by the plaintiff as trustee, who paid the amount of the execution; but for the plaintiff's protection, Norris gave the sheriff a receipt for the rest of the purchase-money. On March 17, 1818, Norris, being about to leave the state, sold said negro to the defendant's testator for one thousand dollars, paid down in cash. There was evidence tending to show that the defendant's testator was informed of the conveyance to the plaintiff before making his purchase. There was some testimony on the other hand that after the defendant's testator purchased he went to the plaintiff and asked him if he had any claim to the negro, and he said he had not. Verdict for the defendant, and the plaintiff appealed, and moved for a new trial.

Mayrant, for the appellant.

Holmes, *contra*.

By Court, NORR, J. The cases involving the questions now submitted to our consideration, which have hitherto occurred in our courts, appear to have been decided upon their particular circumstances, without reference to any general principle by which such cases ought to be governed. And when any general principle has been resorted to, it has been with a view to the particular case then under consideration, without laying down any system of rules to which the several classes of cases of this description may be referred. And although this case may be decided upon its own particular circumstances, yet the period will come, if it has not already arrived, when we must establish some general principles for the government of our decisions which will give somewhat more certainty to the law on the subject than has hitherto prevailed.

I have always been of opinion that the statutes 13 and 27 Eliz. had introduced no new principle, but that they were merely declaratory of the common law. I am aware that the

dicta of respectable judges will be found to the contrary. But such was the opinion of Lord Coke and Lord Mansfield; and Chief Justice Marshall has expressed his concurrence in that opinion: Roberts on Fraud. Con. 19; *Hamilton v. Russell*, 1 Cranch, 316. If, therefore, I have erred, it is some consolation to find myself in the company of Lord Coke, Lord Mansfield, and Chief Justice Marshall. But without relying alone on illustrious names, it appears to me impossible to read those statutes without coming to the same conclusion. The first declares void and of no effect "all feigned, covenous, and fraudulent feoffments, gifts, grants, etc., devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to hinder, delay, or defraud creditors." The other declares void, and of no effect, all fraudulent and covenous conveyances of any estates, etc., made for the purpose and intent to deceive those who have or shall purchase the same. Those statutes, therefore, make void only such gifts, sales, or conveyances as are covenous and fraudulent, and made for the purpose and with the intent to deceive and defraud creditors or *bona fide* purchasers. Now, I apprehend there never was a time when the common law would not have made void covenous and fraudulent deeds, made for the purpose and with the intent to deceive and defraud either creditors or *bona fide* purchasers. These statutes, therefore, it would appear to me can be considered as nothing more than literal transcripts of the common law.

If it be said that in the construction of these statutes, the decisions have gone much farther than the decisions at common law, it may be answered that they have gone much farther than they ever ought to have gone, as I shall be able most satisfactorily to show. But if those decisions can be supported by any just construction of the statutes, the common law would have admitted precisely the same construction. For after departing from the letter of the statutes, all the rest is construction, and would as well have been justified by the common law as the statutes.

But let us come to the case now under consideration. It appears that Luke Norris, the owner of the slave in question, on the thirteenth of February, 1809, conveyed this negro, with other property real and personal, to the plaintiff, in trust for the sole and separate use of his wife for life, with remainder to such children of the marriage as should be living at her death, remainder to himself. Norris, at the time the deed was made,

was very much involved. He owed a Mr. Ricks three hundred dollars, and several other debts; and he afterwards took the benefit of the insolvent debtor's act. It also appeared in evidence that the deed had been declared void by the court of equity, and that the property was ordered to be sold for the purpose of paying the debt to Ricks, or so much of it as was necessary for that purpose; but that all, except some small debts, had been paid several years before the sale of the negro to the defendant's testator.

It may here be remarked that this is the second application for a new trial in this case. On the former trial there was no evidence given of the debt due to Ricks; nor of the proceedings in the court of equity; nor of several other debts, which have now been proved to have been owing by Norris; nor of his having taken the benefit of the insolvent debtor's act. It appears that Norris always continued in possession of the negro, and used and employed him as his own from the time of the deed of trust up to the time of the sale to the defendant's testator. Several questions now arise out of this state of facts.

First. Was the indebtedness of Norris, at the time the deed of trust was made, such as to render it fraudulent and void?

Secondly. Did the subsequent payment of the debts render it valid?

Thirdly. Suppose him not to have been indebted at the time of the sale to the defendant's intestate, was that sale, he being a *bona fide* purchaser for a valuable consideration, good against a prior voluntary deed?

Fourthly. If good without notice, would his having a notice of the prior deed render it void?

Fifthly. Was there sufficient evidence of notice in this case to entitle the plaintiff to a verdict?

On the first question there can be no doubt, if we are to be governed by the English decisions which have taken place on their construction of 27 Elizabeth. They go the whole length of declaring that a subsequent purchaser shall prevail against a prior voluntary deed, even where the purchaser has notice of the voluntary deed. These, however, are cases involving titles to real estate to which the statute exclusively relates. So that the question now is, whether the statute admits of such a construction as to make a difference between the effect of a conveyance of real estate and the sale of goods and chattels, which must be governed by the rules of the common law. In addition to the observations which I have already made on that subject, I

would further remark that the property of this country consists principally of land and slaves. These two species of property are so inseparably connected that one is comparatively useless without the other. The almost invariable habit of the country is, upon settling off a son or daughter, for a parent to give a portion of his lands and slaves as a provision for their support. Now, if a parent should be unnatural enough and dishonest enough to sell the same property which he had thus voluntarily conveyed, could it be contended that the voluntary conveyance of the land would be fraudulent, and that of the personal property good? The statute provides against conveyances made for the purpose and with the intent to defraud. It is not the act of conveying voluntarily which renders the deed void, but the intention with which it is done. The court, therefore, are not to look to the act alone, but to the motive. To be sure, the act may be taken as the evidence of the motive. But not more so in the one case than in the other. And it is difficult to comprehend how even a statute of the British parliament can make a person believe that a conveyance containing both real and personal estate, or cotemporaneous deeds, one conveying real and the other personal estate, attended with precisely the same circumstances, and made for the same object, can be good as to one and fraudulent and void as to the other. Neither can the consciences of men be thus shackled by the most solemn decisions of courts. Courts may decide what may be the legal evidence of fraud, but that being determined, it must be the same, whether it relates to lands or negroes. I do not mean to be understood that an inference of fraud is never to be drawn from the value of the property. Thus, for instance, a voluntary disposition of articles of the first necessity, such as household furniture, provisions, and such like articles, of which the donor is in the habitual use, can not fail to excite a suspicion of fraud. But it would not arise so much from the nature of the property as from the improbability that a person would gratuitously divest himself of those articles which were necessary for his own immediate subsistence. For when he has a superabundance even of these articles it would afford no such evidence. The question then is, whether we shall adopt the English decisions to the whole extent to which they have gone, or whether we shall give our own construction to the statutes and adopt a uniform rule both as to real and personal estate, or rather to inquire whether what we shall think a correct construction of them will not lead to such uniformity. With that view it will be necessary to recur to the cases which have

been decided in our own courts, to ascertain how far any principles have been settled by those decisions, and what those principles are.

I do not know that any case has arisen under the twenty-seventh Elizabeth. I can find none reported. With regard to the voluntary transfer of personal property, I can find but two cases which bear any analogy to this. The first is the case of *Hamilton and Lambright, Trustees of Holman, v. Greenwood*, 1 Bay, 173 [3 Am. Dec. 607]. In that case Holman, the husband, made over several negroes to the plaintiffs as trustees for his wife, being considerably indebted at the time. After having made such voluntary deed, he gave a mortgage of the same property to the defendant to secure a debt which he owed previously to the making of the trust deed. And the question was, whether the trust deed was fraudulent as to the creditors and subsequent purchasers. That is to say, whether the voluntary deed or mortgage should prevail. The reporter represents the court unanimously to have laid it down, that fraud or no fraud, was a matter, under all the circumstances, very proper for the consideration of the jury, and finally submitted the case to them, who found a verdict for the plaintiff. This, then, was only the verdict of a jury from which there was no appeal, and can not, therefore, be considered of very high authority. But I presume that there can be but little doubt that such a verdict would not be supported at this day. It seems now to be well settled as a rule of law, that a voluntary deed is void as to existing creditors whenever the donor is largely indebted at the time of making the deed. Chancellor Kent, in the case of *Read v. Livingston and others*, Johns. C. C. 481,¹ goes so far as to hold that the least indebtedness, however small, will render a voluntary deed void. And none of the cases allow it to prevail, except in cases of inconsiderable debts; such, for instance, as those current expenses which every man is supposed to owe, and where he has at the time ample funds over and above the property so given.

Another case, bearing some analogy to this, is the case of *Teasdale ads. Reaborne, Trustee of Mrs. Opry*, 2 Bay, 546. That was an action brought by Reaborne, as trustee of Opry, to recover certain negroes made over to him for her use by way of marriage settlement before marriage. The husband after marriage sold the negroes to Teasdale. But that was an ante-nuptial settlement made in consideration of marriage, and therefore was not voluntary, but was founded on what, in legal contempla-

1. *Reads v. Livingston*, 3 Johns. Ch. 481 [8 Am. Dec. 520].

tion, is a good consideration. The court, however, took the occasion to declare that a deed making provision for a wife or family is not void merely because it is voluntary. That in order to make it so, it must be made with a view to defeat *bona fide* purchasers or to defraud creditors. It was further held that the circumstance of the husband being indebted to the small amount of about twelve or thirteen dollars at the time of settlement did not affect the case. The plaintiff, therefore, was permitted to recover a verdict against the subsequent purchaser from the husband. These cases, therefore, do not settle anything with regard to the question now under consideration. But I apprehend there can be no doubt that when once it is seen that a voluntary deed is intended to secure the property from the reach of creditors it may also be considered as fraudulent against a subsequent purchaser. The fact that a fraud was originally intended, taken in connection with the subsequent sale, would very well authorize the inference that no change of property was intended to take place, and that the right still continued in the donor, unless such gift should be accompanied by possession separate and distinct from the possession of the donor. Possession of personal property always carries with it evidence of title, and is that kind of evidence of which a purchaser is bound to take notice. If, therefore, the defendant's testator had purchased during the time that Norris was laboring under the load of debt with which he was incumbered at the time the trust deed was made, I have no doubt that the purchase ought to have taken precedence of the gift.

2. The next question is whether the subsequent payment of the debts rendered the trust deed valid. And here it is to be observed that a voluntary deed is always good between the parties. It is void only as it regards creditors or subsequent purchasers. It does not lie in the mouth of the donor to say that he intended it as a fraud, and therefore the donee shall not have the benefit of it. Whenever, therefore, a deed is void merely against creditors, the payment of the debts will cure the defect; but when it is attended with circumstances which authorize a belief that no change of property was actually intended to take place, but that it should revert to the donor as soon as the debts were paid, the rights of a subsequent purchaser cannot be affected by the payment of the debts. Now, what are the facts in this case? The debts were never paid but by a succession of law suits and by the compulsory process of law. As soon as the debts were paid the donor resumed the right of disposing of the

property. The plaintiff did not interfere when he was about to remove it to the western country. And when interrogated by the defendant's testator, with respect to his right, refused to give him any satisfaction. And although the conduct of defendant's testator was not altogether free from suspicion, it did not excuse the mysterious conduct of the plaintiff. Indeed there is reason to believe that this is a speculation on both sides, and that neither party has any very strong claims upon the justice of the court. It is one of those cases which appears to be so shrouded in obscurity that it is difficult to discover its merits; and furnishes but little ground for the exercise of the judgment of the court, and formed a proper case for the consideration of a jury.

3. But let us suppose that no actual fraud was intended, it remains to be determined whether the fact that the donor continued in possession, used the property as his own, and exercised every act of ownership over it, and enjoyed the profits of its labor, is not of itself, in legal contemplation, sufficient evidence of fraud to render the deed unavailing against a subsequent purchaser without notice. And although I do not intend to give a conclusive opinion on that question, it is one of too much importance to be passed over without some consideration. It has already been remarked that the English decisions under the 27th Eliz. have gone the whole length of declaring that a subsequent sale to a *bona fide* purchaser, even with notice, shall prevail against a voluntary deed. These decisions I shall undertake by and by to show cannot be supported by any just construction of the statute. But as far as they have gone to declare that a subsequent sale to a *bona fide* purchaser, without notice, shall itself be evidence of fraud to avoid a voluntary deed, I do not know that they have ever been questioned. And we have been so much in the habit of respecting the English decisions as authority on all their statutes which have been made of force here, that I do not recollect that we have ventured to put a different construction upon one which has come down to us through a train of decisions stamped with the approbation of the able judges of that country; and although we may not always see the reason on which their decisions are founded, it is safer generally to trust to the experience of those who by their wisdom and learning are entitled to our confidence, than to our own hasty views without experience. It would seem to me, therefore, that unless we can make a distinction between cases of real and personal property, and I have not been able to discov-

er any, we must give effect to a *bona fide* sale without notice against a voluntary deed. And such I think has been the prevailing opinion in this State, as may be collected from the decisions to which I have already referred, as well as others. It appears to me also to result from the well-settled principles of law in analogous cases. Possession is the highest evidence recognized by law of a right to personal property. A vendor continuing in possession is regarded, as to creditors or subsequent purchasers, as the owner, against the most solemn, unconditional deed to a *bona fide* purchaser not in possession. A purchaser from a trustee without notice will hold the property discharged from the trust. These are the settled rules of the common law to which the common sense of the community yields a ready assent from the obvious tendency to fraud to which a contrary doctrine would lead. It may be said that, as the object of the deed of trust in this case was to make provision for the wife and children who were living with the donor, his possession was consistent with the terms of the deed, and, therefore, furnished no evidence of fraud. And it is true that, so far as a presumption of fraud is to be drawn from the variance between the terms of the deed and the possession, the argument is correct. Whenever, therefore, the property has been kept for the separate use of the donee, and the profits and labor reserved as an accumulating fund for his benefit, it may repel the presumption of fraud. But where it has been kept and enjoyed by the donor as his own and for his own benefit, and when the gift is evidenced only by some deed locked up in his desk, or made by parol and recorded only in the tenacious memory of some family gossip, to be called up at any indefinite period, or to be forever buried there, as occasion may happen to suit, such a possession must be considered as inconsistent with the professed object of the deed as if it had been made to any other person and ought to be subject to the same suspicion. If such gifts or conveyances are to prevail against creditors and *bona fide* purchasers, it is impossible to foresee to what extent frauds may not be carried. The generality of expression used in some of our decisions would seem to authorize the inference that when a gift is made by a parent to a child, the possession and use of the property by the parent furnishes no evidence of fraud. But when those cases come to be examined it will be found that the decisions depended on the particular circumstances of each case and have settled no rule of law on the subject. In the case of *Steel v. M'Knight*, 1 Bay, 64, it appeared that a grandfather

made a parol gift of a negro girl to his infant grandchild. The donor continued in possession and used and employed the slave as his own until his death. She was then appraised and sold as part of the estate, and afterwards came into the possession of the defendant as a *bona fide* purchaser. Eighteen years had elapsed before the plaintiff brought his action. Yet under the charge of the court the plaintiff recovered and the defendant acquiesced in the verdict. I can not help thinking that it was a most extraordinary decision. But being a mere circuit decision it is of no authority. And the case is of no importance except for the mischief it has done and the rich harvest it has brought to the profession. The case of *Smith and Littlejohn*,¹ 2 McCord, 362, was a gift by a parent to his child. But in that case the donor was not indebted at the time of the gift, and the creditor and subsequent purchaser were aware of the gift at the time the debt was contracted. The case of *Kidd v. Mitchell*, 1 Nott & McCord, 339 [9 Am. Dec. 702], was one of a similar nature and turned also upon the evidence of notice. So that it does not appear to me that any of our decisions stand in the way of any rule which we may now think proper to adopt.

4. It is, however, contended that the defendant's testator was aware of the trust deed at the time of his purchase, which gives rise to the question how his title can be affected by notice. The cases in the English books which involve that question are: *Buckle v. Mitchell*, 18 Ves. 116;² *Pulvertoft v. Pulvertoft*, Id. 90; *Metcalf v. Pulvertoft*, 1 Ves. & Beam, 133;³ *Otley v. Manning*, 9 East, 59; *Hill v. Bishop of Exeter*, 2 Taunt. 69; and *Doe v. James*, 16 East, 212. In these cases, and several others, it is held that a purchaser for a valuable consideration will hold against a voluntary donee, even though he may have knowledge of the voluntary deed at the time of the purchase. And we are now to determine whether these doctrines are to have a governing influence on our judgments. I have already expressed my opinion with regard to the respect due to the decisions of the English judges on questions which have not been the subject of decisions in our courts. And although this question may have been discussed, I do not know that it has ever been decided, and I am induced to think that as far as the question has been considered, our courts have entertained different views of the statutes of Elizabeth from the English judges. When this case was formerly before this court, the question of notice

1. *Smith v. Littlejohn*.

2. 18 Ves. 100.

3. *Metcalf v. Pulvertoft*, 1 Ves. & Beam, 180.

seemed to constitute the most important feature of it. And in the case of *Kid and Mitchell*¹ it is said that a deed is not void merely because it is voluntary; it is so only against creditors and subsequent purchasers without notice. There possibly may be cases where a subsequent purchaser would not be affected by notice. If the voluntary gift be actually fraudulent, notice to the subsequent purchaser cannot do away with the fraud. If the voluntary deed be a mere pretense, and no actual change of property be intended to take place, it still remains the property of the donor, and may become the property of a subsequent purchaser, even though he may have notice of the prior deed. But I speak of cases unattended with any other evidence of fraud than what is to be inferred from the subsequent sale. If the decisions of the English courts had come down to us supported and approved by the experience of the able judges of that country, and acquiesced in by our own, we should not now, perhaps, be authorized to disregard them. But so far from coming with such recommendation, we find them deprecated by all the eminent judges of the present day. In the case of *Buckle v. Mitchell*, the master of the rolls says: "I have great difficulty to persuade myself that the words of the statutes warranted, or that the purposes of them required, such a construction; for it is not easy to conceive how a purchaser can be defrauded by a settlement of which he has had notice before he makes the purchase:" 18 Ves. 110. In the case of *Pulvertoft v. Pulvertoft*, Id. 79,² the lord chancellor observes: "The construction put upon the statutes is singular; that a man paying what in other cases is called paying an obligation of nature should be considered as within the penalty of these acts." In the case of *Otley v. Manning*, 9 East, 70, Lord Ellenborough uses the same language. Lord Mansfield, also, in the case of *Boshet v. Martyn*, 1 New Rep. 332, expresses his regret that such a decision had ever been made. I think, therefore, that the question is still open for our consideration, and that we are at liberty to put our own construction upon these statutes, notwithstanding the unanimous decisions which have taken place upon them in England, and perhaps in the other states. The English judges do not now follow their own decisions because they are consistent with the letter or spirit of the statutes, but because they have so long prevailed as to have become the rule of property, and that to reverse them would be productive of more mischief than to persist in an error. Chancellor Kent also says he

1. *Kid v. Mitchell*, 9 Am. Dec. 702.

2. 18 Ves. 84.

inclines to the modern opinions expressed by the English judges, but that a contrary doctrine has now taken too deep root to be shaken. But it cannot be said to have taken root here. Happily for us it has never been planted in this state. And the question now is whether we shall follow decisions which are admitted to be wrong, or whether we shall profit by the experience of those distinguished judges whose opinions are entitled to so much respect, and avoid their errors. The professed object of the statutes is to avoid deceitful and covenous conveyances, made with the intent and for the purpose of defrauding creditors and *bona fide* purchasers. But a deed intended to provide for those for whom we are bound by the obligations of nature to provide is not fraudulent, merely because it is voluntary, and he cannot be considered a *bona fide* purchaser who, knowing of such voluntary conveyance, combines with the donor thus dishonestly to defeat his own benevolent act. He can not be defrauded who purchases with a knowledge of a pre-existing deed, but ought to be considered as an actor in the fraud rather than the voluntary donee. And such seemed to be the opinion of the court in the case of *Kid v. Mitchell*, above referred to.

It only remains then to be determined whether defendant's testator knew of the plaintiff's claim at the time of the purchase. I think there are strong reasons to believe that he had such notice. And that was the principal ground on which the former new trial was granted. The cause was tried in the first instance before me. I was not satisfied with the instructions which I had given to the jury on that point, and was, therefore, in favor of granting a new trial. The case has now undergone a second investigation under all the advantages afforded by a former trial. The evidence of fraud was much stronger on the last trial than the first, and the evidence of notice, I think, not so strong. It is probable that the jury have had the benefit of all the light of which the case is susceptible, and having found two concurrent verdicts, I do not think the court ought again to interfere. The motion is, therefore, refused.

New trial refused.

VALIDITY OF VOLUNTARY CONVEYANCES IS DISCUSSED at length in the note to *Jenkins v. Clement*, 14 Am. Dec. 703; see, also, *Coutts v. Greenhow*, 5 Id. 472; *Salmon v. Bennett*, 7 Id. 237; *Reade v. Livingston*, 8 Id. 520, and note; *Hudnall v. Teasdall*, 10 Id. 671; *Wade v. Colvert*, 12 Id. 652; *Miles v. Richards*, Id. 584; *Jackson v. Town*, 15 Id. 405; *Garland v. Rives*, Id. 756. It is the intent with which a voluntary conveyance is made which determines its character as fraudulent or otherwise: *Kenney v. Dow*, 13 Am. Dec.

342; *Garland v. Rives*, 15 Id. 756. Such a conveyance can be assailed only by those injured by it, or their successors in interest; that is to say, by creditors and *bona fide* purchasers: *Sides v. McCullough*, 12 Am. Dec. 519, *Burgett v. Burgett*, 13 Id. 634. A conveyance fraudulent as against creditors and purchasers is good between the parties and their representatives: *Osborne v. Moss*, 5 Am. Dec. 252; *Peaslee v. Barney*, 6 Id. 743; *Hendricks v. Mount*, 8 Id. 623; *Kid v. Mitchell*, 9 Id. 702; *Terril v. Cropper*, 13 Id. 309; *Jackson v. King*, 15 Id. 354; *Sickman v. Lapsley*, Id. 596 and note. But the general doctrine seems to be now established in most of the states by legislation or judicial decision that an executor or administrator of a grantor in such a conveyance may, as the representative of the defrauded creditors, recover the property so transferred, if necessary, for the payment of debts: See the notes to *Ewing v. Handley*, 14 Am. Dec. 157; and *Sickman v. Lapsley*, 15 Id. 599. A subsequent purchaser having notice of a prior conveyance at the time of purchasing can not impeach it: *Kid v. Mitchell*, 9 Am. Dec. 702.

PEIGNE v. SUTCLIFE.

[4 McCORD, 387.]

INFANT IS LIABLE IN CASE FOR EMBEZZLEMENT of goods intrusted to him, if he has attained the age of discretion.

ACTION on the case against the defendant for embezzling certain goods intrusted to him by the plaintiff as his agent, as mate of a schooner, to be delivered to one Lightbourne, at Rio Pongus, in Africa. Plea, infancy, to which the plaintiff demurred generally. Other facts are mentioned in the opinion.

Hunt, for the defendant, argued that though the action was in form for a tort, it was in substance on contract, and an infant is not liable in contract for goods sold and delivered: Carth. 160. And a case for assumpsit can not be turned into tort to make him liable: 1 Com. on Con. 149, 150.

Yeadon and Finley, contra, claimed that the action was both in form and substance for a tort, and that infants are liable for their torts: 1 Esp. 172; 1 Nott & McC. 197 [*Word v. Vance*, 9 Am. Dec. 683]; 6 Cranch, 226; 3 Bac. Abr. 585.

BAY, J. I have considered this case, and I am decidedly of the opinion, that the demurrer to the plea of infancy ought to be sustained. It is a well-established rule of law, that all contracts with infants are void or voidable except for necessities, and the reason of the law is founded on the supposed want of judgment and discretion in their contracts and transactions with others, and it is to prevent them from being overreached by persons of maturer years and experience. But there are other cases in law where this indulgence and protection shall not ex-

tend to an infant; as in all cases of criminal actions and wrongs done to the persons or estates of another: *Infant's Lawyer*, 34. The reason assigned in such cases, is, that *malitia supplet ætatem*, especially if the infant be of the years of discretion, and it was alleged in this case that the defendant was between nineteen and twenty years of age (which was not denied) at the time these goods were committed to his custody, and there has been a most evident wrong done to the plaintiff. In the first place, there was a shameful breach of confidence in not delivering these goods agreeably to order; and in the second place, an equally shameful and dishonest piece of conduct in converting the proceeds to his own use, both of which are exceptions to the manifest rules of exemption which the law has allowed for the protection of infants from their own imprudent transactions in their dealings with others, as laid down in the authorities quoted. The case quoted from *Carthew*, 160, by the counsel for the defendant, was one of a mercantile nature, where it was held that an infant who was a partner in a mercantile house, was not liable on a bill of exchange drawn by the house and returned protested, although the other partners were. So, in like manner, if goods are sold to an infant, (except for necessaries), he is not liable, and such sale shall not be converted into a tort, so as to charge him in that form of action as laid down in 1 Com. on Con. 149, 150, and also as mentioned in 8 T. R. 335, which were relied on by the counsel for the defendant in his argument.

In the present case, however, there was no contract for the sale of the goods; and the present action is one of a special nature founded on fraud and not on contract, consequently none of the authorities urged on the part of the defendant will apply or bear the defendant out in support of his plea. On the contrary, although the law will not allow an infant to be charged on contract except for necessaries, yet he shall be answerable in all cases of a criminal nature and for torts and trespasses, etc., 3 Inst. 301; 8 Rep. 44; *Infant's Lawyer*, 34. Under the circumstances of this case the law will charge an infant in all cases arising *ex delicto*, or for wrongs done the plaintiff, and in some cases he is liable even in assumpsit for money had and received; as where money has been embezzled by him. 1 Peake's *Nisi Prius*, 223. Lord Kenyon said the case was new and had not been decided, but he was of opinion that this action, though in form arising *ex contractu*, in fact arose *ex delicto* and as defendant could not have defended himself by

reason of infancy if an action of trover had been brought for the money, so he ought not to be allowed to defend himself on that ground in this action. The same doctrine is laid down in 1 Nott & McCord, 197 [*Word v. Vance*, 9 Am. Dec. 683]; that an action of deceit will lie against an infant on a warranty for the sale of a horse; and even where the form of action is *ex contractu*, and the substance *ex delicto*, the defense of infancy will not avail: 6 Cranch, 641. C. J. Marshall laid it down in a case brought up from Alexandria upon a writ of error, as the opinion of the supreme court that infancy is no complete bar to an action of trover, although the goods converted be in possession of the defendant in virtue of a previous contract. The conversion is still in nature of a tort; it is not an act of omission but of commission, and it is within the class of offenses for which infancy can afford no protection. The case was that of seventy barrels of flour shipped at Alexandria under the care of defendant as supercargo, to be sold at Norfolk. Instead of obeying the orders of plaintiff, defendant shipped the flour to the West Indies, which was lost at sea, and for this the action was maintained. In 3 Bac. 585, it is said, where an infant being master of a ship at St. Christopher's beyond sea, by contract with another undertakes to carry goods to England and there deliver them, but does not deliver them agreeably to the contract, and wastes and consumes them, he may be sued for the goods in a court of admiralty, though he be an infant, for this is but in nature of detinue or trover and conversion at common law. From all the authorities and the reason and justice of the case, I am of opinion that the demurrer to the plea should be sustained.

From this decision the defendant appealed, and moved to set aside the judgment, but the court of appeals affirmed the judgment for the reasons assigned.

Judgment affirmed.

INFANT'S LIABILITY FOR A TORT.—An action of deceit lies against an infant: *Word v. Vance*, 9 Am. Dec. 683; and see the note thereto.

PEYTON v. SMITH.

[4 McCord, 476.]

WORDS OF PERPETUITY OR INHERITANCE are not necessary to devise a fee. DEVISE OF "MY PLANTATION" gives a fee.

RETROSPECTIVE STATUTE, WHAT IS NOT.—A statute enacting that no words of limitation shall "hereafter" be necessary to devise a fee is not retrospective but declaratory.

POWER OF LEGISLATURE AS TO RETROSPECTIVE ACTS.—The legislature can not in general establish a rule to operate retrospectively; but when the rule is unsettled, it belongs to the legislature to settle it, and such a rule necessarily operates both prospectively and retrospectively.

TRESPASS to try title. The principal question was whether or not a life estate or a fee was given by the words: “My plantation on Slann’s Island I devise to my cousin, William Smith;” if the former, the plaintiffs were entitled to recover; otherwise, the defendants. It was a question, also, whether or not the act of 1824, the material part of which is stated in the opinion, applied to the case. On a special verdict finding the facts, the court below gave judgment for the plaintiff. Motion to reverse the judgment.

Ford and De Saussure, for the motion.

Petigru, Attorney-general, contra.

By Court, JOHNSON, J. The only question involved in this case was settled by the judgment of the court in *Dunlap v. Crawford*, 2 McCord Ch. 171, and I only use it now for the purpose of expressing more fully than I then did the reasons which induced me to concur in that judgment.

Until the organization of this court in December, 1825, the chancellors, sitting as a court of appeals, had exclusive and final jurisdiction in all matters of equity cognizance. And judges of the law courts, sitting as an appellate court, under the name of the constitutional court, held like cognizance of all cases arising at law. As might have been expected, the two courts occasionally differed, and amongst other things on the question now before us.

In *Hall v. Goodwyn and Moore*, 2 McCord, 383,¹ decided in May, 1820, the constitutional court held that a devise of lands without words of inheritance or perpetuity, vested only a life estate; and in the case of *Jenkins v. Clement and Deas*, Harper’s Eq. 73 [14 Am. Dec. 703], decided in 1824, the court of appeals in equity in the construction of a clause in this identical will, expressed in precisely the same terms with that now under consideration, held unanimously that the devise passed a fee, although there are no words of perpetuity or inheritance, and laid down the rule broadly that a general unqualified devise of lands vested a fee simple. The two courts were at variance on several other important points of law, and the rights of parties depended more upon the tribunal before which they

1. *Hall v. Goodwyn*, 2 Nott and McCord, 383.

were investigated than any settled rule. This was an evil growing out of this double system of jurisprudence, and was too grievous to be long borne by the community, and the legislature, as a partial remedy, undertook by the act of December, 1824, to fix a rule, and declare the law in most or all of the questions on which the two courts had differed. By the first section of this act it is enacted, "that no words of limitation shall hereafter be necessary to convey an estate in fee-simple by devise, but every gift of land by devise shall be considered as a gift in fee-simple, unless such a construction be inconsistent with the will of the testator, expressed or implied."

It is agreed on all sides that in the construction of wills made subsequently to this act, the rule of construction presented by it is imperative, but the controversy here arises out of the circumstance that this will was executed, and that the testator died long before the passing of the act, and it is considered that its application to this will would give the act a retrospective operation.

There is nothing in the terms of the act itself which shows that it was intended so to operate, and I concede fully the principle that in general the legislature can not prescribe and establish a new rule and give it retrospective operation. But I apprehend that where the rule is unascertained and unsettled, it belongs to the legislature to ascertain and settle the law, and that from necessity such a law must operate both prospectively and retrospectively.

The case under consideration will illustrate, I think, the existence and necessity for such a principle. The will of the testator, Edward Wilkinson, contains, amongst other things, the following devise, viz.: "My plantation on Slann's Island I devise to my cousin, William Smith;" and the question is, whether the devisee took a fee-simple or a life estate only. Before the act of 1824, the rule which prevailed in the courts of equity gave him the fee-simple, and that which obtained in the courts of law, a life estate only. The respective courts were equally supreme and independent in their respective departments, and each were governed by their own rules, but there was no common rule. The law of the land was unsettled and unascertained, and the act of 1824 was notoriously intended for that purpose. It is the fiat of the people acting through their representatives, as umpire between the clashing opinions of the two courts, and must, therefore, be permitted to operate, not as a new rule originating in the act itself, but as a rule of the common law.

I was myself one of those who concurred in the rule laid down in the case of *Hall v. Goodwyn and Moore*, and my assent to the opinion expressed in that case was founded upon mature reflection, and upon the fullest conviction that it was in strict conformity with the settled rules of law; nor has anything which has since occurred satisfied my judgment that I was mistaken. But the circumstances under which the act was passed, and the notorious fact that it was intended to secure a uniformity of decisions in the different courts, leave no doubt that it was intended as a declaratory law, and however confident I may have been in my own opinions, I am constrained to yield to this high authority, and I do so with the less reluctance, from a knowledge of the truth on which the opinions of the chancery courts was founded, that where a limited estate was intended to be devised, it is almost, if not universally, expressed in appropriate terms, and the evil, if one should arise out of it, will be very limited in extent.

This conclusion is, I think, warranted by, or rather necessarily grows out of the cases of *Taylor v. Gibson*,¹ and *Rose v. Daniel*, 3 McCord, 451.² There the question was whether, when the statute of limitations had commenced to run, the intervening disabilities of infancy in a case of trespass to try titles would avert its operation. In the case of *Rose and Daniel*, which had come up some years before, the court held that it would; but in the subsequent case of *Faysoux v. Prather*, 1 Nott & McCord, 296 [9 Am. Dec. 691], that decision was reversed by three judges to two, and one absent whose known opinion was with the minority. At a subsequent period, and when the constitutional court consisted of six judges, the old case of *Rose v. Daniel*, and the case of *Gibson v. Taylor*, both came up on the same question, and the court being equally divided, were unable to pronounce any judgment, and they remained on the docket, when the act of 1824, above referred to, was passed, which also contains a clause declaring that thereafter the statute of limitations should not be construed to defeat the rights of minors, when the statute had not barred the right in the life-time of the ancestor, etc.; and when the cases came on to be tried before this court, the rule originally laid down in the case of *Rose v. Daniel*, and in conformity with the act, was adopted, and the reasons given are, that the divisions of the court rendered the law uncertain, and the act was declaratory of what the law was; and that a dif-

1. *Gibson v. Taylor*, 3 McCord, 451.

2. *Rose v. Daniel*, 2 Tr. Const. R. (S. O.) 549.

ferent determination would drive the court to the necessity of adopting a different rule for the cases under consideration, and those which might afterwards arise.

Now, regarding the case of *Hall v. Goodwyn and Moore*, as binding on the courts of law, a different rule, as has before been shown, prevailed in the courts of equity, which rendered the law uncertain; so that it stood precisely in the same situation with the question in the cases of *Gibson v. Taylor*, and *Rose v. Daniel*; and all the reasons which operate to give effect to the act in one instance apply with equal force to the other.

I am, therefore, of opinion, that the motion in this case should be granted, and that the *postea* should be delivered to the defendant.

Judgment reversed.

FEE PASSES WITHOUT WORDS OF INHERITANCE or perpetuity in a devise: *Lindsay v. McCormack*, 12 Am. Dec. 387; *Jenkins v. Clement*, 14 Id. 703. Thus, the word "estate" carries a fee: *Jackson v. Merrill*, 5 Id. 213; *Jackson v. Delancy*, 7 Id. 403. So the words, "all his other property:" *Mayo v. Carrington*, 2 Id. 580. So a devise imposing a charge on the devisee passes a fee: *Jackson v. Bull*, 6 Id. 321; *Findlay v. Smith*, 8 Id. 733; *Lindsay v. McCormack*, 12 Id. 387. But a devise charging the testator's debts on the land devised, was held in *Jackson v. Bull*, 6 Id. 321, not to carry a fee. As to what words in a will will pass realty, see: *Tolar v. Tolar*, 14 Id. 575, and note.

ROBINSON v. CROWDER.

[4 McCord, 519.]

FOREIGN COMMISSION OF BANKRUPTCY gives the assignees no lien against a subsequent attachment by creditors here.

PARTNER'S POWER TO BIND BY DEED.—Partners have no power to bind each other, or the firm of which they are part, by deed.

AFFIXING A SEAL, WHEN UNNECESSARY to the validity of a contract, will not vitiate it.

ASSIGNMENT UNDER SEAL, of the effects of the firm, by one or more of the partners for the payment of the firm debts, binds the rest.

ASSIGNMENT UNDER A FOREIGN BANKRUPT LAW transfers the bankrupt's property, wherever situated, as between him and his assignees.

CREDITORS HERE ARE NOT BOUND BY AN ASSIGNMENT in England in aid of the bankrupt law, for such an assignment cannot have an effect beyond or inconsistent with the law itself.

BANKRUPT'S ASSIGNERS STAND IN THE SAME SITUATION AS THE BANKRUPT, with respect to foreign creditors, and take subject to the same rights and remedies.

ASSIGNMENT IN ENGLAND NOT IN AID OF THE LAW, made within two months of the bankruptcy, is void.

ATTACHMENT of property of Crowder, Clough & Co. to satisfy the claim of the plaintiffs, who were creditors residing in this state. Thomas Case, an assignee of the defendants, residing in England, came in and claimed the property. The facts were found by a special verdict, and are stated in the opinion. Judgment below for the claimant, from which the plaintiffs appealed, and now moved to set the same aside.

King, Petigru and Harper, for the motion. The assignment in England had no effect on the right of creditors here to have the goods attached for the payment of their claims: *Fox v. Hanbury*, 2 Cowp. 445; *Smith v. Stokes*, 1 East, 363; *Harrison v. Sterry*, 5 Cranch, 289, 300; *McMillan v. McNeal*, 4 Wheat. 212; *Topham v. Chapman*, 1 Const. 283; *Oyden v. Saunders*, 12 Wheat. 364; *Dickerson v. Legare*, 1 De Saus. 537. The English courts take no notice of a foreign bankrupt law: *Smith v. Buchanan*, 1 East, 6; 20 Johns. 260 [*Holmes v. Remsen*, 11 Am. Dec. 269.] The decision of Chancellor Kent, in *Holmes v. Remsen*, 4 Johns. Ch. 489, giving effect to a foreign assignment, has been overruled, and is opposed to all the English cases. The voluntary assignment under which the assignee in this case claimed, was void even in England: *Kennedy's Bank*. L. 99, Appendix B.; *Ex parte Blake*, 1 Coxe, 198. The solvent partner residing here had full control over the funds in his possession, of which his co-partners could not deprive him: *Fox v. Hanbury*, 2 Cowp. 445; *Smith v. Stokes*, 1 East, 363; *Britwood v. Miller*, 3 Meriv. 279; *Harrison v. Sterry*, 5 Cranch, 289, 300. The bankruptcy operated like death to dissolve the partnership: *Fox v. Hanbury*, 2 Cowp. 445; *Ex parte Williams*, 11 Ves. 5; *Crawshay v. Collins*, 15 Id. 218; *Crawshay v. Mall*, 1 Swanst. 506; *Montagu on Part.* 118. After which one partner had no power to bind another: *Righson v. Pillen*, 1 Stark. 375; *Kilgore v. Finleson*, 1 H. Bl. 155; 1 McCord, 16; *Gow. on Part.* 283. A deed by two of several partners does not bind the rest: 1 *Montagu on Part.* 42, 43.

Hunt and Lance, contra. Though the bankruptcy did not affect property beyond the realm, yet the voluntary assignment by two of the partners was binding upon the other and upon the effects in his hands: *Harrison v. Sterry*, 5 Cranch, 289; *Mills v. Barbour*, 4 Day, 428; *Kirk v. Hudson*, 3 Johns. Ch. 405. A prior voluntary assignment takes precedence over an attachment: 8 Wheat. 168, 288; *Holmes v. Ranselm*, 4 Johns. Ch. 489;¹

1. *Holmes v. Remsen*, 4 Johns. Ch. 489 [8 Am. Dec. 581].

1 Bay, 88. The only deed which a partner can not make is one which would not be good without a seal: *Mills v. Barbour*, 4 Day, 428. Affixing a seal to a contract which would be valid without it does not vitiate it. The reason that one partner can not bind his co-partners under seal is, that it is not within the scope of the partnership business: 4 Bac. Abr., tit. Merchant C., 608; 5 Com. 88.

By Court, JOHNSON, J. The facts ascertained by the special verdict, stated in their chronological order, are concisely these: The defendants, Thomas Crowder, Henry Thomas Perfect, and James B. Clough, all British subjects, were partners in trade. The two former, Crowder and Perfect, resided in Liverpool, England, and the latter, Clough, in Charleston, South Carolina, and carried on business at these places respectively under the firm of Crowder, Clough & Co. On the eighth of August, 1825, the house in Liverpool committed an act of bankruptcy, and on the twentieth day of the same month Crowder and Perfect executed an assignment in the name of Crowder, Clough & Co., under their hands and seals, to Thomas Case, of all and singular the debts, estates, and effects of the said Crowder, Clough & Co. within the United States, in trust for all the creditors of Crowder, Clough & Co. ratably, and shortly after a commission of bankruptcy issued in England against the said Thomas Crowder and Henry Thomas Perfect. On the nineteenth of September, of the same year, and shortly after these proceedings were had, the plaintiffs and others claiming to be creditors of the said Crowder, Clough & Co., and residing here, sued out writs of attachment, which were levied on their effects, estates, and credits which were found here. At this time James B. Clough had left this state, but was still in the United States; and on his going to Liverpool afterwards, a commission of bankruptcy issued against him also there on the tenth of June, 1826. On the return of the attachments, Thomas Case, through his attorney in fact, interposed his claim to the effects so attached, and the question now submitted is, whether he is entitled to them under the deed of assignment so made. If he is, it follows that the plaintiffs take nothing by their attachment; if not, then, of course, this motion must prevail.

This, as a question of international law, is, in itself, highly interesting, but is rendered more so by the zeal and ability which it has elicited from the counsel on both sides, and the learning which has been put in requisition. By recurring to the facts stated, it will be seen that the commission of bank-

ruptcy against Crowder and Perfect, was prior in point of time to the plaintiffs' attachment, and the question has been raised, but not with much confidence, that the proceedings in bankruptcy operated as a transfer to the commissioners of all the property which belonged to Crowder, Clough & Co., where-soever it might be found, to the exclusion of the subsequent attaching creditors. But the case of *Topham v. Chapman*, 1 Const. Rep. 229 [12 Am. Dec. 627], is decisive of that question. In that case the question arose directly between the assignees of a bankrupt in England and attaching creditors here, and although the attachments were issued subsequent to the suing out of the commission of bankruptcy, the court held that it did not create such a lien on the property here as gave it the preference over the liens created by the attachments of the attaching creditors, and that judgment is, I think, very fully sustained both by principle and authority.

A question of more difficulty arises out of the claim set up in behalf of Case, founded on the deed of assignment of the twentieth of August, 1825, also prior to the plaintiffs' attachments, by which Crowder and Perfect, in the name of Crowder, Clough & Co., have assigned to him all their property in the United States.

Independently of the interest, which creditors residing here may have in the property assigned, there is no question that as between the parties the assignment would be binding here as well as in England, and supposing it to have been voluntary and binding, according to the laws of that country, and not inconsistent with our laws, the courts here would, upon the well-settled principles of universal law, be bound to give it effect and operation.

But, it is objected for the plaintiffs: 1. That this assignment being by deed, and made by two of the partners only, is not binding on the third, and is, therefore, void; 2. That the assignment was either in aid of the bankrupt laws in England, and calculated to give them an effect here inconsistent with the laws of this country, and therefore void; or that the rights of Crowder and Perfect in the property assigned, vested in the commissioners in virtue of the proceedings in bankruptcy, and the assignment was, therefore, nugatory and inoperative.

As to the first, the books furnish numerous *dicta*, which sustain the position that partners can not bind each other, or the firm of which they constitute a part only, by deed; but on examination of the cases, it will be found that they relate to

transactions that are purely mercantile, and that they depend on the principle that a partner can do no act which will be binding on his firm, which is inconsistent with or foreign to the object of their association.

Simple contracts, such as promissory notes, bills of exchange, open accounts, and others of like nature, are, according to usage, regarded as mercantile contracts, and the copartnership is entered into with reference to the powers of each partner to bind his firm in this mode; and for that reason it would seem one partner can not bind his firm in a penal bond: *Bac. Abr. Merchant, C*; nor can he transfer the real estate of the firm, used for the purpose of carrying on business, by deed, because it might in effect defeat the object of partnership: *Ibid.* If, however, the buying and selling of lands and other real estates, which can only be transferred by deed, was the object of the copartnership, no one will doubt but that a partner might bind his firm by such an instrument.

I apprehend, too, that where a seal will not change or vary the liability, and is not essential to the nature of the contract, then, also, the addition of a seal will not vitiate it; as in the case of a release, in which the authorities all agree that it is good, notwithstanding the addition of a seal: *Com. Dig. tit. Merchant, D*, Day's ed., note H, sec. 151, where the cases on this subject are collected, and they proceed on the principle that the release, independently of the seal, contains intrinsic evidence of the payment of the debt, and is, therefore, good against the firm.

Again, let us suppose that at the foot of a bill of parcels a partner had acknowledged in the name of the firm and under seal, that in consideration of a sum specified, he had sold and delivered to his customer the goods therein contained, would it be doubted that such a memorandum would be a good bar to an action brought by the firm, for the goods themselves or their value? I think not. And it appears to me very clearly that if Crowder and Perfect were in other respects competent to make the assignment in question, it is not vitiated by the presence of a seal. In the case of *Harrison v. Sterry*, 5 Cranch, 300, it was held, and I think on very sound principles, that an assignment of funds for the payment of debts was in the course of trade. Indeed, every partial application of funds to the payment of debts, whether it consists of cash or goods, or anything else, is, in effect, an assignment for that purpose, and binds the firm. And if, in the course of things, a general

assignment becomes necessary, there can be no reason why it should not be equally binding. The principle is the same whether it be partial or total, and it follows that in either case one may bind the whole.

It is said, however, that the assignment was not obligatory on James B. Clough, the partner resident here, and I concede that, as between themselves, Crowder and Perfect had no control over the interests of Clough, and that their assignees could only take their interest in common with Clough, but this was an appropriation of the whole funds of the concern to the payment of all their debts, and whether he had any interest or not must depend on a surplus remaining after the payment of the debts. The whole was applicable to that object, and if the whole was necessary, he was bound to that extent.

The remaining questions which I deem it necessary to notice, arise out of the second objection above stated. It is that the assignment was in aid of the bankrupt laws of England, and calculated to give them an effect here, inconsistent with the laws of this country, and therefore void; or that the rights of Crowder and Perfect in the property assigned by virtue of the proceedings in bankruptcy were vested in the commissioners, and by relation back to the act of bankruptcy, and the assignment was, therefore, nugatory and inoperative. It has been before shown that in the conflicting operations of the English bankrupt laws and our attachment laws, unaided by extrinsic circumstances, the latter would take the precedence of the former, as between the assignee of the bankrupt and the attaching creditors, and it follows as a necessary consequence, that if this assignment was a constituent part of the proceedings in bankruptcy, and was in aid of the bankrupt laws, it can not have an effect of itself either inconsistent with or to an extent beyond the law itself. Now, there are many circumstances connected with this assignment, which favor the conclusion that it was intended to aid the operation of those laws. It was made after a notorious act of bankruptcy, and is in its terms merely provisional, evidently with an eye to the consequences which followed. Being an assignment for the benefit of all creditors ratably, it was in itself an act of bankruptcy; and by the laws of England such an assignee is held to be a trustee for the assignees under the commission of bankruptcy.

The terms of the English bankrupt laws which entitle the bankrupt to his discharge are a general and unqualified surrender of all his property, and it unquestionably extends, as

between himself and the assignees, to property in a foreign country; and if assignments executed under circumstances like these are to have the effect and operation contended for on the part of Case, they would soon grow into common use, and thus give an effect to those laws which is denied to them by the well-settled principles of international law.

The alternative contained in the objection above stated is, I think, equally conclusive against the claims of Mr. Case. There is no doubt that under the former statutes of bankruptcy, the assignment by the commissioners vested in the assignee all the property of which the bankrupt was possessed, and that, too, in relation back to the act of bankruptcy, by avoiding all intermediate transfers: Com. Dig., tit. Bankruptcy, D. 26; and the recent act under which these proceedings are said to be the first that were had, makes no change which can affect the question under consideration. By the seventy-eighth section, all transfers of property, etc., made more than two months before suing out of the commission and without notice of the act of bankruptcy are declared to be valid, leaving the law with respect to those made within that period as it stood before, and by necessary implication avoiding all made within that period: Kennedy's Bankrupt Law. The act of bankruptcy in this case was committed on the eighth of August, 1825, and although the special verdict does not ascertain the day on which the commission was issued, it was prior to the suing out of the attachments on the twenty-ninth of September following, and the assignment having been made within these periods, was necessarily within two months of the suing out of the commission, and was therefore void, unless it was to be regarded as in aid of the bankrupt laws, the consequences of which have been before noticed. Notwithstanding the difficulty in which the question has been involved, and the apparently conflicting opinions which have been entertained in relation to it, I think I may venture safely to lay it down as well-settled law, that the proceedings under the bankrupt laws of England transfer to the assignees all the interest which the bankrupt had in the property assigned, whether it was found in England, or in this or any other foreign country. In support of this position it might, perhaps, be sufficient to rely only on the case of *Topham v. Chapman* [12 Am. Dec. 627], before referred to, in which, upon a review of most of the cases, it is conceded to the extent necessary for the purposes of this case, and in which my brother Nott, who delivered the opinion of the court, comes to the con-

clusion that, by the assignment, all the goods of the bankrupt, *ubicunque fuerint*, vest immediately in the assignees. I will add to this, however, another case of more recent occurrence, and which has also a strong bearing on a branch of this case before noticed. In *Holmes v. Remsen*, 20 Johns. 259 [11 Am. Dec. 269], Mr. Justice Platt, after a very laborious and learned investigation of the doctrine, and all the cases on the subject, reasons himself to the same conclusion: He observes: "That the true principle is that the assignees of a bankrupt are on the same and no better footing than the bankrupt himself in regard to foreign debts. They take subject to every equity and subject to the remedies provided by the laws of the foreign country where the debts are due, and when permitted to sue in foreign countries it is not as assignees having an interest, but as representatives of the bankrupt." In the case of *Hunter v. Potts*, 4 T. R. 182, the doctrine was carried so far that a creditor residing in England, who had attached the money of a bankrupt abroad, was, in an action brought against him on his return to England, held to be liable to the assignees as for money had and received to their use.

The deductions from these views necessarily lead to the conclusion that, regarding the assignment as in aid of the bankrupt laws of England, it can have no effect beyond the law itself, and that, under the proceedings in bankruptcy, the legal right in the property vested in the assignees, as between them and Crowder, Clough & Co., by relation back to the act of bankruptcy; so that, in any view of the matter, Case took nothing under the assignment, and led the court to the adoption of the order made in the cause at the last term. The motion is granted, and leave given to the plaintiff to enter up judgment on the special verdict.

Judgment reversed.

ASSIGNMENT UNDER FOREIGN BANKRUPT LAW.—See on this subject, *Bird v. Caritat*, 3 Am. Dec. 433; *Dawes v. Boylston*, 6 Id. 72; *Milne v. Moreton*, Id. 466, and note; *Mitchell v. McMillan*, Id. 690; *Vanuxem v. Hazlehursts*, 7 Id. 582, and note; *Holmes v. Remsen*, 8 Id. 581, and note; *Ramsey v. Stevenson*, 12 Id. 468, and note; *Topham v. Chapman*, Id. 627. As to a voluntary assignment under the bankrupt law of a sister state: *Ingraham v. Geyer*, 7 Am. Dec. 132; *Mason v. Wash*, 12 Id. 138.

PARTNER CANNOT BIND HIS COPARTNERS BY DEED without special authority under seal: *Gerard v. Basse*, 1 Am. Dec. 226; *Williams v. Hodgson*, 3 Id. 563; *Skinner v. Dayton*, 10 Id. 286; *Morgan v. Scott*, 12 Id. 35, and note; *Trimble v. Coons*, Id. 411. But it was held, in *Straffin v. Newell*, 4 Am. Dec. 705, that in the usual course of business a partner may affix a seal, as in the case of a charter party.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

VAUGHAN v. PHEBE.

[1 MARTIN & YEDGER, 1.]

PEDIGREE.—Hearsay or reputation is legal evidence upon a question of pedigree, and may be received to establish descent from Indian ancestors, and, consequently, to prove a right to freedom based on such descent.

DECLARATIONS OF DECEASED MEMBERS of a family are admissible to prove relationship.

THE RIGHT TO FREEDOM is a right of a public nature; and common reputation regarding the status of the person whose right thereto is disputed, or of his ancestors, is admissible as evidence in his favor.

THE COMMON REPUTATION which is competent as evidence in cases of custom, prescription, etc., must be reputation as to the right, privilege, or franchise claimed, and not hearsay as to any particular fact from which the right might be inferred.

DECISIONS OF THE COURTS OF A STATE OR NATION interpreting its own statutes will not be questioned elsewhere.

PROOF OF A JUDGMENT must be made by producing the best evidence of which the nature of the case admits. For this purpose hearsay is inadmissible.

A JUDGMENT between other parties may be admitted in those cases where hearsay evidence of the facts upon which the judgment is grounded would be unobjectionable. Therefore, in an action involving the plaintiff's right to freedom, the court may receive in evidence the record of a judgment between strangers to the present action, establishing the right to freedom of a maternal aunt of the plaintiff.

PHEBE, a woman of color, sued **Vaughan** in an action of trespass and false imprisonment, to which he pleaded that she was his slave; and to this plea, she replied by denying that she was a slave and the property of the defendant **Vaughan**. The issue

thus formed was tried before a jury, who found for the plaintiff. On the verdict of this jury, judgment was entered "that the plaintiff recover against the defendant her freedom, and her damages, etc." The defendant Vaughan prosecuted an appeal in the nature of a writ of error to the supreme court.

At the trial the circuit court admitted in evidence the depositions of Seth R. Pool, Martha Jones, and Phebe Tucker, notwithstanding the objection interposed by the defendant to the competency of all of Pool's deposition, and so much of the depositions of the other witnesses as related to hearsay and information from others. Pool's evidence as set out in his deposition was, substantially, as follows: That he had known the plaintiff, Phebe, for fifty years, and that she was always said to be of Indian extraction; that he was also acquainted with her mother, called Beck, who was also always reputed to be an Indian, by descent; and that he believed she was the daughter of Moll, the property of William Jones; that Beck was the sister of Tab, the property of Benjamin Tucker; that Tab had always claimed her freedom, and, as the witness believed, had got her freedom by due course of law; that Phebe was descended from an Indian mother, and was always considered free; that Tab, the sister of Phebe's mother, had recovered her freedom, in an action brought by her against Benjamin or Littlebury Tucker, in consequence of her descent from a free Indian mother; that he had often been told that Murene was the grandmother of Beck and Tab, and that she, Murene, was remarkably old and lived about among her grandchildren, and was free and was always reputed to be an Indian; that Murene was a copper-color; that Abner, the brother of Phebe, sued, as he was informed and believed, Thomas Hardway for his freedom and was killed by the latter; and that Phebe had often solicited him to assist in procuring her freedom, but that he had refused because he was an old acquaintance of her master. The portions of the depositions of Martha Jones and Phebe, objected to by the defendant, were in their general nature and purport similar to the deposition of Pool; but in addition to the facts stated by Pool, they said they understood Minor and several other relatives of Phebe had obtained their freedom.

The second exception on the part of the defendant Vaughan, showed that the circuit court, against his objection, admitted in evidence the record of a verdict and judgment of the superior court of Prince George county, Virginia, in the suit of *Tab et al.*

v. *Littlebury Tucker*, by which Tab recovered her freedom on the ground that she had descended from Indian ancestry.

Rucks, for Vaughan, the plaintiff in error. The evidence of Pool, Mrs. Jones, and Mrs. Tucker is hearsay, and ought, therefore, to have been rejected, because a right to freedom is in general susceptible of better proof. Hearsay is inadmissible to prove the fact of a pauper's having gained a residence: *King v. Inhabitants of Eriswell*, 3 T. R. 721; or the birth-place of a bastard: *King v. Inhabitants of Erith*, 8 East, 539; or to establish any specific fact, which, in its nature, is capable of being proved by witnesses who testify from their own knowledge: *Mina Queen and child v. Hepburn*, 7 Cranch, 291; *Davis v. Wood*, 1 Wheat. 6. The depositions ought to have been rejected because the witnesses do not state from whom their information was derived: *Whillocke v. Baker*, 13 Vesey, 514; *Garland v. Browner*, 18 Johns. 37. The court erred in permitting the witnesses to state that they had heard or understood that other of Phebe's relatives had recovered their freedom by due course of law; the records ought to have been produced. But the records could not be evidence against Vaughan, who was not a party thereto: *Chapman v. Chapman*, 1 Munford, 398; *Davis v. Wood*, 1 Wheat. 6.

W. L. Brown and F. B. Fogg, contra. This case must be decided in accordance with the law of Virginia, where Phebe was born and raised. Under this law, the burden of proof (after Phebe was shown to have descended from an Indian ancestry) was upon the defendant Vaughan, to show that her ancestors were brought into Virginia prior to 1691, and after 1679: 1 Hen. & Mun. 134. The evidence received in the circuit court is competent in Virginia: 1 Wash. 123; 1 Hen. & Mun. 134; 2 Id. 193. These decisions would be followed by the supreme court of the United States: *Guy v. Shelby*, 11 Wheat. The testimony concerning the general reputation of plaintiff and her ancestors with respect to their right to freedom was competent: *Ross v. Cooly*, 3 Johns.; 1 Stark. Ev. 59. The record of the judgment and verdict by which Tab obtained her freedom was properly received: *Barr v. Gratz*, 4 Wheat.; 1 Stark. Ev. 213; *Carthew*, 281; *Peagrim v. Isabel*, 2 H. & M.

Rucks, in reply. The rule that the courts of one state should be bound by a decision of another state, is confined exclusively to cases where the courts of the latter state have put a construc-

tion upon their own statutes, or have decided upon rights to real property, originating under their laws.

By Court, CRABB, J. The defendant in error brought suit against the plaintiff in error, in trespass. The plaintiff in error pleaded that Phebe was a slave and his property. Whether she was free or a slave was the question. The cause was tried before a circuit judge in Sumner County, and a verdict returned by the jury for Phebe. A judgment was entered "that the plaintiff recover against the defendant her freedom and the damages," etc. Vaughan prayed an appeal, in the nature of a writ of error, to this court.

At the trial Vaughan, by his counsel, objected to the reading of the depositions of Seth P. Pool, and so much of those of Martha Jones and Phebe Tucker as related to hearsay or information from others. Phebe, by her counsel, offered as evidence a record of proceedings in a court in the state of Virginia, in the suit of Tab and others against Littlebury Tucker, commenced in 1799, and ended in 1812, to show that Tab had a verdict and judgment for her freedom. Tab was proved to be the maternal aunt of Phebe. Vaughan objected also to this record, but the court below admitted the whole of the depositions and the record to be read, to which Vaughan excepted. The residue of the evidence in the cause is not set out in the bill of exceptions.

Some of us have had much difficulty in coming to a conclusion satisfactory to our minds as to some of the points made in the cause. The peculiar value of the right claimed, and the improbability of such a right being successfully asserted in many instances, except by such evidence as that which has been resorted to on this occasion, on the one hand, and on the other the want of entire coincidence between what has been heretofore done by judicial tribunals, whose decisions are precedents for this, and what we are now asked to do, added to the imposing character of two decisions, both of which, and one especially, would seem to militate against the introduction of the evidence received in the court below, have been the causes of that difficulty. To the arguments made, the decided cases produced on both sides and some others, a laborious and anxious examination has been given. It only remains for us to make known some of the considerations that have influenced us, and to announce the result to which we have been conducted in the best exercise of judgment of which we are capable. We shall not undertake to re-

mark in detail upon either the books or the arguments relied on at the bar.

What the circuit court said, as to the effect of the evidence, or the purposes for which it was received, or what other testimony was brought forward to support the verdict, does not appear. The questions are, therefore, simply as to the admissibility of the depositions, and the verdict and judgment for any legal purpose.

Let the first question be, Did the court below err by admitting the depositions?

That so much of them as relates to pedigree is legal evidence, was admitted by the counsel for Vaughan, in argument. This is certainly a matter of long standing, such as those where courts "from necessity, and on account of the great difficulty of proving remote facts in the ordinary manner by living witnesses," have been in the habit of receiving hearsay and reputation as to pedigree. And I suppose the proof has been made by the best procurable witnesses, taking into view the lapse of time, the removal of the plaintiff below into this from another and distant government, and other circumstances. Such proof is generally expected from the members of the family whose genealogy is in question, or others who, from their situation, would be likely to possess the requisite knowledge. A brief examination will manifest that much more of the offered evidence is covered by the established rule in relation to pedigree than the counsel for Vaughan seemed to suppose.

Take the question of pedigree to be simply a question from what ancestors an individual derived his birth, which is a much more confined and limited sense than is often practically applied to it. Suppose that Phebe, instead of alleging, as she does in this case, that she is descended from, or, in the language of the witness, has her extraction from a long line of Indian ancestors, had assumed the position that she was descended from a maternal great-grandmother named A. B., could she not prove this by hearsay or reputation, after having first established the freedom of A. B., or with the intention of afterwards establishing it? No one will deny that she could. Why can she not, with equal propriety, show in the same manner that she is maternally descended from the Indians of America, after having first shown, or intending otherwise to demonstrate, that those Indians were either all free, or that they were at least *prima facie* to be presumed free? It may be here remarked that if Phebe be shown to be descended from Indian ancestors

in the maternal line, all doubt will cease as to her being at least *prima facie* free. Had the residence of her ancestors always been in this state, we apprehend the fact of such descent would be conclusive evidence of her freedom. But her ancestors came, or were brought, into Virginia, and the plaintiff below lived in that government until she was, some years since, brought here. The court of appeals of that state, who must be presumed to have construed their own statutes aright, say, *Hudgins v. Wrights*, 1 Hen. & Mun. 139, that the act of assembly of Virginia, of 1691, repealed the acts of 1679 and 1682. And we heartily concur with them in the opinion that, although an Indian taken into Virginia between 1679 and 1691 might be a slave, yet "all American Indians, and their descendants, are *prima facie* free, and that where the fact of their nativity and descent, in a maternal line, is satisfactorily established, the burden of proof thereafter lies upon the party claiming to hold them as slaves."

Let us return to the doctrine of hearsay evidence in cases of pedigree:

Hearsay, or reputation, under the rule with regard to pedigree, is not confined to the fact of descent from a specified ancestor or a tribe or nation of ancestors. It may be received to show the truth of another fact from which such descent can be reasonably inferred. "Thus," says a popular writer on evidence, *Phill. Ev.* 168, "declarations of deceased members of the family are admissible evidence to prove relationship; as who was a person's grandfather, or whom he married, or how many children he had, or as to the time of a marriage, or of the birth of a child, and the like, of which it cannot be reasonably presumed that better evidence is to be procured." See *Bul. N. P.* 294; 3 *Starkie's Evidence*, 1113, and the reported cases cited at the bar. From this examination it appears to us clear that the circuit court did not err in admitting those parts of the depositions which speak of any of the persons whose genealogy is in question, having been called of Indian extraction, "called of Indian descent," etc., which is tantamount to saying they were commonly reputed to be descended from the Indians, etc. So, also, that the court did not err in receiving the hearsay as to Murene being reputed an Indian, etc.

But these depositions contain statements of the common reputation, in the state of Virginia, that some of the persons whose freedom was in question were free. And hence arises the most difficult and embarrassing question: whether, when

it becomes necessary to inquire into occurrences of a remote period, common reputation is admissible to prove the right to freedom?

From the nature of the remedy provided, and for a long time sanctioned for the enforcement of the right of freedom, there must necessarily often be inquiries into the transactions of remote periods. This remedy, as is well known, is the action of trespass. Whenever necessary to bring suit, there has, of course, been a continuation of the trespass up to the time, or near the time, of commencing it. The act of limitations would consequently be no bar. Hence results the necessity of often introducing proof of a kind that would be unusual and unnecessary in ordinary cases. And partly from this cause, this case is assimilated to cases which have been allowed an exemption from the strict rule prohibiting all sorts of hearsay evidence. It may be added, without our intending to give an opinion either way as to the correctness of the position, that very respectable judges have maintained the broad position, without allusion to the form of action, that length of time does not bar the right of freedom in the same way, and to the same extent, as in other cases: See Judge Roane's opinion in *Hudgins v. Wrights*, *ubi supra*.

How is an individual in this country, who is unfortunate enough to have a woolly head and a colored skin, to prove that he is free? Not being white, nor copper-colored, nor having straight hair and a prominent nose, the presumption probably is that he is a slave: See *Hudgins v. Wrights*, *ubi supra*. Contrary to the general rule, he who is charged with having trespassed upon his person pleads an affirmative plea, and yet need not prove it. He says, in justification of his trespass, that the plaintiff is a slave, and yet on that plaintiff is devolved the *onus probandi* to show himself a free man. How is he to show it? He may, perhaps, procure testimony that he, or some ancestor, was for some time in the enjoyment of freedom; that he has acted as a freeman; that he has been received as a freeman in society; and very soon will find himself under the necessity, increasing in proportion to the distance he has to travel into time past, for want of other evidence, to use hearsay, that he, or his ancestor, was commonly called a freeman, or commonly reputed a freeman, or, in other words, evidence of common reputation. And why should he not? Is it a concern of so little moment that the law, in its benignity, ought to refuse those aids for its support and protection that have been so ex-

uberantly extended in analogous cases? Is it of less importance than the right of digging stone upon the waste of the lord of a manor? *Moorwood v. Wood*, 14 East, 327.¹ Or the right of the lord to take coals from under the lands of those holding under him? *Barnes v. Mawson*, 1 Mau. & Sel. 77. Or a right to have a sheep walk over a piece of land? 3 Stark. Ev. 1209. Or a right of way over a piece of land? Bul. N. P. 295. Or to a modus by which sixpence an acre should be paid in lieu of small tithes? *Harwood v. Sims*, Wight's Ex. Rep. 112. These are a few out of many cases.

But it is said these rights, franchises, etc., which in England are permitted to be established by common reputation, or hearsay of common reputation, are or savor of a public character; and, therefore, the public, where this reputation is to be formed, will be more apt to possess a knowledge of their existence, etc. We put it to the candid and the enlightened, whether the right to freedom has not in this respect very much the advantage over many of those rights where such evidence is every day received in the English courts? Indeed, it is no light matter to be a freeman of these United States. Freedom in this country is not a mere name—a cheat with which the few gull the many. It is something substantial. It embraces within its comprehensive grasp all the useful rights of man; and it makes itself manifest by many privileges, immunities, and external public acts. It is not confined in its operations to privacy, or to the domestic circle. It walks abroad in its operations, transfers its possessor, even if he be black, or mulatto, or copper-colored, from the kitchen and the cotton-field to the court-house and the election ground, makes him talk of *magna charta* and the constitution, in some states renders him a politician, brings him acquainted with the leading citizens, busies him in the political canvass for office, takes him to the ballot-box, and, above all, secures to him the enviable and inestimable privilege of trial by jury. Can it be said that there is nothing of a public nature in a right that thus, from its necessary operation, places a man in many respects on an equality with the richest, and the greatest, and the best in the land, and brings him into contact with the whole community? Can it be said that common reputation is no evidence of a right producing so many effects relative in their character to that very society where the common understanding, report or reputation is required to exist? Can it be said that the community or neighborhood, as the case may

1. *Morewood v. Wood*, 14 East, 327.

be, the "public" around a man, will too readily give credence to a claim by which the individual who makes it obtains among themselves so high a comparative elevation? If those around him have interest or prejudice, they will usually be against his claim. It is difficult to suppose a case where common reputation would concede to a man the right to freedom, if his right were a groundless one. If such a case be imagined, it will most probably be an extreme one; and we must bear in mind, that when the evidence we are speaking of is received, it is not regarded as conclusive. It is to be weighed, encountered, and compared with other evidence, and ultimately to have no more effect than, after a full examination, the jury shall be disposed to give it. I can not see how dangerous consequences are likely to result from its admission.

Slavery, in our sense of the word, is not known in England. Such a right of franchise, therefore, as an exemption from slavery existing around them, has no place there, and rules with regard to it are unknown to their code. The right to freedom in this relation, as well as the mode of proceeding for its assertion, is of American growth. Courts can not be expected to shut their eyes on this important circumstance.

Let not the gentlemen object that prescriptive rights are regarded as null in England, or, at farthest, not more than *prima facie* good, unless they have had existence, time whereof memory of man is not to the contrary, and unless the claimant can bring himself within the strict rule as to recent enjoyment; and that, therefore, we ought not to liken the right of freedom to them, as we can not preserve the parallel throughout. We must ask them to recollect that we are not relying on cases as to prescription, etc., as precedents in this cause, but that we are endeavoring, by analogy, to ascertain what is the rule in a new case, in a new sort of action, as to a new sort of right. *Nullum simile est idem*, or in the language of the supreme court of the United States, in the case of *Nichols and Webb*, we are endeavoring to "adapt the rule of evidence to the actual condition of men," believing that in this sense it must "expand according to the exigencies of society."

Common reputation may be proved in cases of custom, prescription, etc. It must be reputation as to the right, privilege, franchise, etc., claimed, and not hearsay evidence as to any particular fact from which the right, etc., might be inferred; contrary to what is certainly the rule in cases of pedigree and boundary. They stand in this respect upon different grounds:

Peake's Ev. 13; as in cases of the former kind, it has been said, so I would say in the instance before us, you may prove the right to freedom by common reputation as to the existence of the general right. But you may not introduce any evidence of hearsay, or reputation, as to any particular fact. The right to freedom is believed not to be a particular fact in the sense in which the latter expression is used in the books. It consists in the exercise and enjoyment of multifarious exemptions, privileges, and rights. In its exercise and enjoyment it produces many particular facts.

So far as the cases produced in Cranch and Wheaton vary from the above principle, if they do so, they have not the approbation of our judgments; and we must dissent from them.

The cases cited from Washington, and Henning and Munford's reports, go strongly to support the view we have taken of the subject; and we concur with the reasoning of the court in those cases.

While, however, we place much reliance on the cases decided in Virginia, we are by no means prepared to subscribe to the correctness of the doctrine urged with earnestness on the part of the defendants in error; that the decision of the courts of Virginia, as they are binding, and demonstrate what the law is there, must be binding here also, this right to freedom having had its origin in that state, and the plaintiff below having had her domicile residence there until lately. Counsel say she would be declared free there, and therefore should be free here.

It is apprehended that this would be carrying the doctrine of comity between the judicial tribunals of independent states and empires farther than it has ever yet been extended under the influence of the rules of international law, or the peculiar provisions of our federal constitution. True it is that the decisions of the Virginia courts, as to the proper construction of their own statutes, would be unquestioned by any tribunal in any other governments: *Elmendorff v. Taylor*, 10 Wheat. 159; 6 Id. 119; 5 Cranch, 230; 4 Id. 428.

And so it would be as to their decisions with regard to real property situated there; the universal rule being that courts are to be governed, as to that sort of property, by the *lex loci rei sitæ*: Vattel's L. of N. and N. b. 2, ch. 8, secs. 103, 110; 10 Wheat. 192, 468; 7 Cranch, 115.

It is equally true, and very notorious too, that contracts are generally to be understood and given effect to agreeably to the law of the country where made.

But is it conceived that the question here is not within the governance of any one of the foregoing principles? To say that Phebe was free in Virginia is begging the question. They certainly have no statute which pronounces her free. Whether free or not, would depend upon the finding of a jury as to the fact of freedom. The difficulty is as to what is the true mode of ascertaining facts of a certain character. And that is to be determined by the rules of common law modified and applied to the actual condition of men and things in this country. On such a subject courts in Virginia judge for themselves. And courts here are bound to exercise and pronounce their own judgment.

There is another point of view in which to place this subject. No doubt the most of the proof in controversy is admissible to show pedigree. Is not the whole of it? When you offer evidence of reputation as to whether a person at a remote period was free, are you not endeavoring to show that he was descended from free ancestors? Are you not showing his descent? Are you not proving pedigree? At all events, the necessity for the evidence being equal, is not the principle the same, requiring its introduction in both instances?

So far, then, as the depositions have allusion to pedigree or common reputation as to freedom, we believe them to be competent evidence. But they contain some statements which are not considered admissible; and in receiving which, we think, the court erred. We allude to the evidence of several of the family having recovered their freedom by due course of law, etc. This ought to have been rejected. It would have been better proved by the records themselves. And it is a maxim of the law of evidence, as true as it is trite, that the best evidence which the nature of the case admits shall be produced. What is said respecting *Tab's case*, was properly recorded, because the record in her case was produced.

But there is a remaining question, Did the court err by receiving the verdict and judgment in the suit of *Tab and others v. Tucker*? That was a suit by Tab for her freedom. She obtained a judgment in her favor on the ground that she was descended from Indian ancestors, as appears from the record. Tab was the maternal sister of Beck, who was the mother of Phebe. We think that hearsay evidence that the maternal sister of one of Phebe's ancestors was always reputed to have been descended from Indian ancestors, or that she was reputed to be free, as having been descended from Indian ancestors,

would be some evidence in a case of pedigree to show that Phebe also was descended from the same. And, therefore, we consider the solemn verdict of a jury, upon proof produced to them many years ago, and with the judgment of the court upon it, full as good evidence, to say the least of it, of what was considered the truth in those days.

We do not consider the question as to the introduction, for any purpose, of verdicts between others than parties and privies, as involved in the determination of this case in any manner whatever. Nor is any opinion given as to the admissibility of judgments, except in the single case of a verdict and judgment offered as hearsay evidence in a case of pedigree, as in the case before us. Such a verdict and judgment was held to be admissible by the court of appeals in Virginia, in *Pegram v. Isabell*, 2 Hen. and Mun. 193, and we believe properly.

Upon the whole, we are all of the opinion that the following judgment and directions be entered in this cause: reverse the judgment and remand to the circuit court for a new trial, and to reject the following words in Pool's deposition, "and that Abuer, the brother of Phebe, the plaintiff, sued, as he is informed and believes, said Thomas Hardeway and was killed by him;" and to reject the following words in Martha Jones' deposition: "deponent believes all Phebe's relations in those parts have also obtained theirs, on the plea of their being descended from an Indian ancestor. Has also understood that one of the same family named Minor, and several others, have since got free, as will appear of record;" and to reject the following words in Phebe Tucker's deposition: "deponent believes all Phebe's relations in those parts got their freedom on the plea of their being descended from an Indian ancestor—always understood that Molly Moore had one of the family by the name of Minor, and several others, all of whom have obtained their freedom upon the same plea." And to admit the residue of said depositions, and also the verdict and judgment, with the proceedings upon which they were founded, in evidence to the jury.

Judgment reversed.

HEARSAY EVIDENCE is admissible to prove relationship, but the same must come from a deceased member of the family, and be free from the presumption of interest or bias, and the name of the person making the declaration must be given by the witness: *Chapman v. Chapman*, 7 Am. Dec. 277; the fact desired to be proved must also be ancient, and it must appear that no better evidence is attainable: *Birney v. Hann*, 13 Am. Dec. 167; see *David v. Sittig*, 14 Am. Dec. 179.

FERRISS v. HARSHEA.

[1 MARTIN & YERGER, 48.]

WARRANTY OF TITLE.—To maintain an action of covenant upon a warranty of title, it must appear that the warrantee has been evicted, by elder and better title, prior to the commencement of the action.

EVICTION, WHAT IS.—A judgment in ejectment, against a warrantee, without an actual ouster by a writ of possession, or a yielding up of possession by the warrantee, is not a sufficient eviction to enable the latter to maintain an action upon the warranty of title; there must be an actual dispossession.

COVENANT, brought by Harshea against Ferriss, upon a warranty of title to land. Ferriss conveyed to Harshea a tract of land in Kentucky, by deed, containing the usual covenants to warrant and defend the title against the claim of all persons whatsoever. Harshea went into possession under the deed, and subsequently, in an action of ejectment against him, the heirs of one Barnett recovered judgment for the possession of the land sold to him by Ferriss. A writ of *habere facias possessionem* was issued on the judgment, but at the time this suit was brought it had not been executed, and Harshea had not been dispossessed. The court instructed the jury that the judgment against Harshea, and the award of the writ of possession in the action of Barnett's heirs against him, without any actual eviction, was a breach of the covenant of warranty contained in the deed from Ferriss to Harshea, and that this action having been commenced before the plaintiff was turned out of possession of the land was no objection to his recovery. Verdict for plaintiff. Motion for a new trial on exception to the charge to the jury.

Thompson and G. M. Fogg, for the plaintiff in error. 1. In actions of covenant upon a warranty of title of lands, it is necessary to aver in the declaration, and prove upon the trial, an eviction, by paramount title in a third person, not deriving title from plaintiff himself: *Foster v. Pierson*, 4 T. R. 617; *Greenby v. Kellog*, 2 Johns. 1; *Kent v. Welch*, 7 Id. 258 [5 Am. Dec. 266]; *Crutcher v. Stump*, 5 Hayw. 100; 2. An eviction is the actual dispossession of the tenant by writ of possession, or it may take place by the delivery up of the premises to the person having the outstanding title: *Hamilton v. Cutts*, 4 Mass. 349 [3 Am. Dec. 222].

J. P. Clarke and G. S. Yerger, contra. There is no breach of a covenant of warranty until an eviction by paramount title; but the eviction, to constitute a breach of this covenant, does

not mean an actual turning out of possession; it means nothing more than a deprivation of right, a damage or loss, by the sentence or judgment of a court: 1 Co. Lit., sec. 145; 3 Id. note 315; *Hamilton v. Cutts*, 4 Mass. 349 [3 Am. Dec. 222]; *Hunt v. Cope*, Cowp. 242; *Lowther v. Commonwealth*, 1 Hen. & M. 201; *Watson v. Kennedy*, 1 Marsh. 389; *Radcliff v. Ship*, Hard. 292.

By Court, WYTHE, J. This record presents to the court for determination the single question, "Whether a judgment in ejectment against the warrantee, without actual ouster by writ of possession, or yielding up of possession by the warrantee, is sufficient proof of an action to maintain an action upon the warranty.

It is argued for Harshea, the defendant in error, that eviction of the warrantee, and a judgment in ejectment against him, are in principle the same; for that the execution follows the judgment, and can not be resisted; and therefore the record of recovery by judgment alone is sufficient evidence of an eviction. And it is further argued, that if an actual dispossession is necessary in law to constitute an eviction, it is not necessary that it should take place before the commencement of the suit by the warrantee. That this is to be collected from the ancient writ of *warrantia chartæ*, which was the remedy by the common law on a real covenant of warranty; and 7 Bacon's Abr. 239, 240, is cited, and relied upon to show this; where it is said, "likewise the warrantee, or his heirs, may at any time before they are impleaded for the land, bring a *warrantia chartæ* upon the warranty in the deed against the warrantor, or his heirs, and thereby all the lands of the warrantee shall be bound and charged with the warranty, into whose hands soever it goes afterwards. So, if the lands warranted be afterwards recovered from the warrantee, he shall have so much land over again of the other land of the warrantor."

This authority does not support the position for which it was introduced.

It is to be observed that the *warrantia chartæ* is twofold in its object; and, as Chief Justice Hobart says in his Reports, 21, it is either provisional or remedial. "In the first, it is of fear and provision, for the purpose of fixing the warranty and binding the possession (or land) of the warrantor." In the second, or remedial, it is resorted to where a loss has been already sustained, and to be recompensed by value.

In the first case, it may be brought by the warrantee, at any time after the warranty is entered into, and before eviction; and

this was admitted, as Hobart says, of fear and provision; it was for the benefit of the warrantee to fix the time the writ is brought, into whose hands soever they may afterwards come, and thus render them liable to the loss that may be at a future day sustained by the warrantee, upon the eviction of elder and better title to the land warranted.

Such was the object and effect of the judgment of warranty; upon which, and the after conviction of the warrantee, he could have an *habere facias ad valentiam*; but this last never could be had until after eviction, or loss sustained; then, and not till then, could the warrantee have recompense for that loss; or, as Hobart lays it down, it shall bind the land from the teste of the *warrantia chartæ*, though he can not have execution until he sustains loss: Hobart, 22, 23; 5 Comyns' Digest, 811; F. N. B. 135 D.; 2 Mass. 433.

Thus, by reference to the ancient real action of *warrantia chartæ*, we see that the warrantee, to have recompense, must have previously sustained loss. So in the present personal action of covenant broken upon the warranty, which has been substituted for the voucher and *warrantia chartæ*, the courts have preserved the same analogy, and required the warrantee to show a loss actually sustained to entitle him to recompense in damages.

In *Gore v. Brazier*, 3 Mass. 544, 545 [3 Am. Dec. 182], Chief Justice Parsons, speaking on this subject, says: "It is certain that before the emigration of our ancestors, the tenant, on being lawfully evicted by a title paramount, might maintain a personal action of covenant broken, on a real covenant of warranty;" and 1 Brownlow, 21, 2; 2 Id. 164, 165, are cited by him; to which may be added Hobart, 22, where Chief Justice Parsons says: "A warranty, of itself real, may be used as a covenant to recover damages." Chief Justice Parsons further says: "This remedy was adopted by our ancestors as early as remedies for evictions of land sold with warranty were necessary; and in a personal action of covenant, it is a general rule of law, that such pecuniary damages be recovered as shall be an adequate compensation for the injury sustained by the breach of the warranty." And in the case of *Martin v. Hobbs*, 2 Mass. 438 [3 Am. Dec. 61], the same able judge says, "that at common law, the tenant, after he had lost his land, might bring a personal action of covenant on the covenant to warrant and defend, and recover a satisfaction in damages; but he must assign a breach of the covenant, an ouster by title paramount."

These authorities, and there are many others to the same effect, prove the strict analogy between the real action of warranty of charters in its remedial effect, and the personal action of a covenant broken, on a covenant in a deed to warrant and defend. That in the *warrantia chartæ*, although in its provisional effect the writ was brought by the warrantee hanging the plea (as it is called), or while he is tenant of the land warranted, and the judgment therein binds the lands of the warrantor; yet it is only provisionally that he is evicted or sustains loss; and that the eviction of the warrantee must take place before he can have an *habere facias ad valentiam*. So, in like manner, in its substitute, the personal action of covenant broken, there must be an eviction or loss sustained by the warrantee before he can recover damages for that loss. The eviction is the breach; it must have been consummated before the action brought, to give cause of action, and must be so proved to support the action. See above cases cited; also, 7 Bac. Abr. 238, 239, note; 3 T. R. 186; Douglas, 112 notes; *Kent v. Welch*, 7 Johns. 259 [5 Am. Dec. 266].

Other books are referred to to show that the judgment in ejectment in this case is an eviction, or equivalent to an eviction: 2 Jacob's Law Dict. 444, is relied on, giving the technical definition of the word eviction. He says it is from *evinco*, to overcome, and means "a recovery of land by form of law," etc. This is no doubt correct; but it is not to the point contended for, to wit, that a recovery of a judgment alone is an eviction.

Recovery of lands, or, in other words, obtaining lands by form of law, comprehends something more than obtaining a judgment; it is inclusive also of the possession, and means obtaining or recovering that also by form of law, a writ of execution.

But although an eviction may be by recovery by form of law, it may also be as good and valid without; that is, by entry, or other act *in pais*, amounting to an entry of him who hath the older and better title, and putting out the tenant or warrantee: Hobart, 26; 4 T. R. 618; *Hamilton v. Cutts*, 4 Mass. [3 Am. Dec. 222]. An eviction, then, whether it be effected by action or by entry, is, in substance, the divesting the tenant of his estate in the land. This results from the obligation of the warrantor, which is "*Nihil aliud quam possidentem defendere et acquiescere, in sua seisina vel possessione, erga petentem;*" which may be thus translated: "Nothing else but to defend and quiet the tenant in his seisin or possession against the plaintiff:" 1 Inst. 345.

The form of the plea of eviction is also good evidence of its

meaning, to wit: "Entered in," etc., "and then and there ejected, expelled, put out, and removed said A B from possession," etc., etc.: Lilly's Entries, 180; 2 Chitty's Pl. 484, 487; 4 T. R. 618; Cowper, 242, 243.

The turning out of possession is not effected by a judgment in ejectment. In *Sedgwick v. Hollenbock*, the supreme court of New York say: "A judgment of itself is no transfer of title, nor does it destroy the seisin of the defendant:" 7 Johns. 376. The eviction, or the turning out of possession, is caused by entry under the judgment, either with or without execution. So Lord Mansfield, in the case of *Atkins' Lessee v. Horde*, 1 Burr. 114, says, speaking of the judgment in ejectment: "He who enters under it in truth and in substance can only be possessed according to right; *prout lex postulat*. If he has a freehold, he is in as a freeholder; if he has a chattel interest, he is in as a termor, and, in respect of the freehold, his possession enures according to right."

I shall now proceed to notice the cases principally relied on by the counsel for defendant in error in support of the charge of the court. They are decisions of the court of appeals of Kentucky. And it is argued that they decidedly prove that the course of decisions in that state is, that the judgment in ejectment against the warrantee, and writ of possession awarded, without actual dispossession, is conclusive evidence of eviction, and ought to govern the present case, as the recovery by the paramount title was in that state. Independent of the latter consideration, the decisions of that court are entitled to the greatest respect. Do these cases support the position contended for?

The first in point of time is *Radcliff v. Ship*, Hardin, 292. That was an action similar to the present, and the plaintiff offered in evidence the record of a judgment recovered against him, by one Thomas Marshall and others, in the court of quarter sessions for Mason county, and on "*habere facias possessionem*" sued out thereon. This record the court below refused to admit, for three reasons. The second reason, which only need be noticed here, is because it does not appear that the party was legally evicted. On this the court of appeals say: "It may be justly observed that no better evidence of eviction ought to be required than the judgment of the court itself. Had the plaintiff refused to yield that just respect and obedience to the court which every good and well-disposed citizen ought to render, then it might have been necessary, in order to

effectuate the justice of the case, and to complete the right of the plaintiff in ejectment, to have executed the writ of possession; but surely there can be no objection to his acquiescing in and submitting to the judgment, thereby rendering compulsion unnecessary, and preventing the further accumulation of costs. The court, therefore, erred in refusing to admit the record in evidence."

This case comes far short of establishing what is claimed for it. The true state of the case, as is evident from the opinion of the court, is, that after the judgment in ejectment, and the writ of possession sued out but not executed, the warrantee, Radcliff, submitted, and gave up possession, acquiescing in the judgment, and thereby rendered the execution unnecessary. Such a case was good evidence of an eviction. But it seems the warrantor insisted that the recovery of the possession should have been by an actual turning out by the sheriff, by force of the writ of execution, and that the relinquishing the possession, and submitting to the judgment, was not a legal eviction. To meet this part of the case were the observations of the court directed; for the court do not say that without such a case the judgment of itself is a sufficient evidence of eviction. The court, to be sure, do say: "It may justly be observed that no better evidence of eviction ought to be required than the judgment of the court itself." The court were here only observing upon the credit that ought to be given to a judicial proceeding, and the respect that ought to be paid to the judgment of a court, as a proper reason for the warrantee's delivering up possession; and this is evident from the phraseology of the sentence, and the judgment of the court; which is, that the record be admitted (not, however, as conclusive or sufficient) evidence of the eviction.

The next case is *Watson v. Kennedy*, 1 Marsh. 389, which was an action of covenant upon a warranty in a deed. The court say: "The objection was made to reading the record of the action of ejectment. From the nature of the case the record would prove no fact material in the cause but the eviction; and of this it was admissible as evidence, as has been repeatedly decided by this court." This case, so far from showing that in Kentucky the course of decision has been that a judgment in ejectment is sufficient evidence of an eviction in an action of covenant upon a warranty in a deed, it shows that the record, not the judgment alone, of the recovery in ejectment against

the warrantee by the elder and better title is admissible (not sufficient or conclusive) evidence of an eviction.

This case, being the later case, goes farther, and shows what is the course of decision in that state, and gives us the right understanding of the cases decided in Kentucky; thus concurring with the decisions in Massachusetts and New York; and, to my mind, it is a position not to be entertained of so highly respectable a court as that of Kentucky, without the most irrefragable proof that upon a question of common law there should be a difference between it and those other courts equally respectable for learning and talent.

It is, therefore, the opinion of this court that the judgment of the circuit court be reversed, and that the cause be removed to the court from whence it came, for a new trial to be had therein, on which trial the judge shall charge the jury according to the principles of law laid down in this opinion.

CRABB, J., being of counsel in this cause, did not sit.

EVICTON, NECESSARY TO MAINTAIN ACTION for breach of covenant of warranty of title. It is well settled that to enable a person to maintain an action for breach of a covenant of warranty, there must be an eviction, but by this is not meant an actual dispossession of the grantee from the land; it is sufficient if the paramount title is so asserted that he must yield to it or go out; and such is the rule stated in the principal case: See *Cummins v. Kennedy*, 14 Am. Dec. 45, note 53; *Hamilton v. Cutts*, 3 Id. 222.

ON A BREACH OF THE COVENANT OF WARRANTY, the measure of damages is the value of the land at the time of the contract: *McKean v. Reed*, 12 Am. Dec. 318; *Horaford v. Wright*, 1 Id. 8; *Staats v. Ten Eyck*, 2 Id. 254.

CRENSHAW v. THE STATE.

[1 MARTIN & YERGER, 122.]

FELONY—A CONVICTION, JUDGMENT, AND EXECUTION, UPON ONE INDICTMENT FOR A FELONY, not capital, is a bar to all other indictments for felonies, not capital, committed previous to such conviction.

CRENSHAW was indicted at the August term, 1826, upon three several indictments: 1. For stealing a horse on April 29, 1826; 2. For stealing a gray mare February 4, 1826; 3. For forging a note January 23, 1826. He was convicted and punished on the first indictment. He then withdrew his plea of not guilty to the other two indictments, and pleaded his conviction upon the first indictment in bar, to which plea the state demurred, and the demurrer being sustained, defendant pleaded

guilty to the second and third indictments, and the court pronounced judgment against him, from which judgment, and from the judgment overruling his said plea in bar, Crenshaw prosecuted this writ of error.

Bell, for plaintiff in error.

A. Hays, attorney-general, contra.

By Court, CATRON, J. The single question in this cause is, Can a defendant plead in bar a conviction, judgment, and execution upon one indictment, for a felony not capital, to all other indictments for felonies not capital committed before such conviction, judgment and execution? It is frankly avowed, by the attorney for the government, that the object of this cause having been brought here was to test this point, which is deemed a doubtful one by the circuit courts, as we are informed.

The first inquiry is, What was the common law upon the subject, as regulated by the statutes of 8 Eliz., ch. 4, and 18 Eliz., ch. 7? By the common law, all felons convicted of crimes not affecting the king were entitled to the benefit of clergy for the first offense. All laymen who could read were burnt in the hand, and those who were of the clergy and peers were not branded; after which, the offender was delivered to the ordinary to be dealt with according to the ecclesiastical canons. Then the defendant went through another trial, the object of which was to acquit and restore him to all of his civil rights, in point of fact; but should the jury agree, in the justice of the common law conviction, the culprit was degraded and compelled to do penance: 2 Hawk. P. C. sec. 5, ch. 33; 1 Chitty's Cr. Law, 667.

That this latter trial was a mere mockery, and intended to support the ascendancy of the church over the state, will be admitted; yet many of the consequences of this mode of proceeding still remain a part of the English law. The 18 Eliz., ch. 7, provides, that upon a defendant being admitted to his clergy, he should not be delivered to the ordinary, but should be branded and discharged: 2 Hawk. P. C., ch. 33, sec. 124.

The branding followed the prayer of the benefit of clergy by the act of 4 Hen. VII, ch. 13, M. for murder, and T. for any other felony, was inflicted in open court, not as a punishment, but as an evidence that the clergy had been allowed to the defendant; by force of which statute, branding is to this day inflicted in open court in cases of manslaughter; and by analogy, in other cases, where the branding is a part of the punishment by statute;

although no good reason can be seen for this practice, in cases where it is inflicted as a part of the punishment for the offense.

Up to the eighth of Queen Elizabeth, it seems to be pretty well settled that a conviction, judgment, branding, and then delivering the culprit over to the ordinary, to be dealt with by the church according to its canons, was a bar to an arraignment for any other felony, excepting perhaps such as affected the king. This will be pretty clearly seen by the cause of the *Queen v. Stone*, reported by Dyer, 2 vol. 214 b.

Stone, in the fourth year of Queen Elizabeth, was indicted for a clergyable felony, convicted, prayed his benefit of the clergy, and the court took time to advise without ordering the defendant to be delivered to the ordinary. At a subsequent session the defendant was indicted for a felony, from which the benefit of clergy had been taken away by statute, to wit: by robbing the high treasurer of England, and his servant Devyck. Defendant pleaded not guilty, was tried, and convicted. It was then moved that he be discharged, by reason of his former conviction; and it was contended, that forasmuch as the culprit had not been delivered over to the ordinary, there was a conviction without execution, which was no bar to an indictment for the second offense; but the court decided that the execution was well enough, and he entitled to the same benefit thereof, as if delivered over to the ordinary; in which case he could not have been arraigned on the second indictment: 114 Pl. Com. 374. On the twenty-eighth of May, in the 8th Eliz., Stone was a third time indicted for the murder of Agner, the son of Devyck, who was principally privy to the robbery, which murder was done the next day after the robbery was committed—was convicted, and had judgment to be hanged. The execution was respited from time to time, by command of the chief justice, but finally Stone was executed.

In the latter part of the year of the eighth of Elizabeth, the statute 8 Eliz., ch. 4, sec. 4, was passed, declaring that a conviction, judgment, and delivery to the ordinary should not bar an indictment for a felony not clergyable, which was committed before such conviction and judgment; but that a felon in such case should be arraigned, tried, and if found guilty, executed, notwithstanding his former conviction and delivery over to the ordinary. This statute is good evidence that before the passage of the act the law was otherwise, to wit: that such conviction and delivery over was a bar to an arraignment for any felony committed previous to the former conviction: *Armstrong v. Lille*,

Kelyng's Rep. 103, 104.¹ A similar provision is found in the 18 Eliz., ch. 7, sec. 5, which provision is a recognition of the 8 Eliz., ch. 4, sec. 2; Hawk., ch. 33, sec. 127. By the second and third section of the 18th Eliz., defendants praying their clergy shall be allowed the same, branded, and discharged, without being delivered over to the ordinary; provided, that the justices may cause them to be imprisoned, at their discretion, not exceeding one year. By this statute the defendant is entitled to the same privileges as if delivered to the ordinary. By the common law, this was a bar to all felonies committed; the exceptions in the 8th and 18th of Eliz. are only partial; that felonies not clergyable, and committed before the conviction and judgment, shall not be barred by such conviction and judgment. But all felonies not capital stood as they did at common law, and a conviction and punishment for one felony is a discharge of all precedent felonies not capital; nor ought the defendant to be arraigned for such subsequent felony, if he plead the former conviction and punishment in bar: 2 Hawk., ch. 33, sec. 127, 128, ch. 36; S. N. 2 Hale, 253; 4 Bl. Com. 374.

The next inquiry is, Have our statutes against horsestealing and forgery altered the common law upon this subject? The act of 1807, ch. 74, sec. 4, declares horsestealing to be felony; and the act of 1811, ch. 1, sec. 2, declares the forgery laid in the indictment felony; but neither of the crimes is capital for the first offense.

It struck us with some force in the first instance, when considering these statutes, that the defendant, if found guilty, is ordered to pay for the horse stolen, and the costs of the prosecution. But it will readily occur that the plea in bar is an admission of the facts alleged in the indictment; there having been no plea of not guilty over, therefore the costs and value of the horse stolen could be awarded by the court in the same manner as if the defendant had pleaded guilty; yet by law his plea was a good one in bar of any further prosecution on the first and second indictments. The demurrer must be overruled, the defendant taxed with the cost of the prosecutions, up to the time of filing said pleas; the state with the residue of the costs and the costs of the court.

Judgment reversed.

FELONY—CONVICTION, WHEN BARS OTHER PROSECUTIONS.—At the ancient common law a felony was a public offense, which occasioned a total forfeiture of either lands, or goods, or both, and to which capital or other punishment

1. *Armstrong v. Lisle*, Kelyng's B. 103, 104.

might have been superadded, according to the degree of guilt: 4 Blackstone's Com. 95, 96; 1 Bishop on Criminal Law, 4 ed., sec. 580. The idea of a felony was so generally connected with that of capital punishment at the common law, that to speak of a crime as a felony was to consider the same as an offense punishable by death; but this was by no means universally so, and the idea of capital punishment, even at the ancient common law, did not enter into the true idea and definition of a felony. A felony may have been committed and yet the law not assign to it capital punishment, as in cases of self-murder, excusable homicide and the like; and, as stated by Sir Wm. Blackstone: Bl. Com., vol. 4. 97, "the true criterion of a felony is forfeiture; for, as Sir Edward Coke justly observes: 1 Inst. 391, in all felonies, which are punishable with death, the offender loses all his lands in fee simple, and also his goods and chattels; in such as are not so punishable, his goods and chattels only." One of the consequences attending the conviction of a person, at the common law, of a felony punishable by death, upon sentence being pronounced, was that he became, by operation of law, in a state of attainder: 4 Bl. Com. 480; 1 Chitty's Crim. Law, 723; Co. Lit. 390, b. The word attainder, as here used, is derived from the Latin word *attinctus*, signifying stained or polluted. On the attainder, the person attainted, is considered as *civiliter mortuus*, and therefore incapable of exercising any civil functions whatever; he was not allowed to transfer, or otherwise dispose of, or exercise any control or dominion whatever over his estate, real or personal, and upon a verdict of guilty being rendered, he became attainted, so far as the disposition of his personalty was concerned, and upon judgment being entered upon the conviction, it extended to his realty. The chief consequences of attainder, were, as stated by Chitty in his work on Criminal Law, 727, "forfeiture and corruption of blood." Forfeiture in criminal cases of the defendant's property to the crown, was a consequence attending the conviction of crime, that is of very ancient origin, and seems to have been practiced by the early Saxons, and to have formed a part of the ancient Scandinavian constitution. Blackstone, in speaking of the justice of the forfeiture and confiscation of a person's property upon being convicted of the crime of high treason, and the same reason would seem to apply when a person has been convicted of any other felony, punishable capitally, says: "The natural justice of forfeiture or confiscation of property, for treason, is founded on this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between the king and people, hath abandoned his connections with society; and hath no longer any right to those advantages, which before belonged to him purely as a member of the community; among which social advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures, moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of punishment, but also by his passions and natural affections; and will interest every dependant and relation he has, to keep him from offending:" 4 Bl. Com. 382.

The forfeiture that resulted upon a man being convicted of a felony other than high treason extended to his chattel interests absolutely, and the profits of all estates of freehold during life; and after his death, all his lands and tenements in fee-simple to the crown for a very short period of time, instead of absolutely, as in case of conviction and judgment for high treason. The other consequence attending the conviction and attainder, was the corruption of blood both upwards and downwards; so that a person attainted could neither

inherit lands or other hereditaments from his ancestors, nor retain those that he already possessed, nor transmit them by descent to his heirs, but the same escheated to the lord of the fee, subject to the king's right of forfeiture; and nothing could pass by inheritance through the party attainted: Chitty's Crim. Law. 740, 741; 4 Black. Commentaries, 338. It was early held in England that persons being thus attainted might plead the same in bar, to a subsequent prosecution for any other felony, whether committed before or after the first conviction; for, by his first attaint his possessions were forfeited, his blood corrupted and he became dead in law; therefore any further conviction or attaint would be fruitless: 4 Bl. Com. 336; *Queen v. Stone*, 2 Dyer, 214 b.; 2 Hale Pleas of the Crown, 250; *Armstrong v. Lisle*, 12 Modern, 109; 1 Chitty's Crim. Law, 464. This plea was styled, the plea of *autrefois attaint*, or a former attainder, and the reason for allowing the same is stated by Chitty, at p. 464 of his work on criminal law, as follows: "That when once a felon is attainted he is dead in law, his whole possessions are forfeited, his blood is corrupted, and nothing remains but to put in execution the sentence of death, under which he continues so that any second attainder would be superfluous. It may, therefore, be pleaded as well when the attainder arose from a different charge, as from the same offense of which he is indicted."

The plea was never received with favor, even in England, and consequently many exceptions were soon established by judicial decisions, to the rule stated, and it was held that the plea was never admissible, except where a second trial would be wholly superfluous: Co. Litt. 390, b. n. 2. "Where, therefore, any advantage, either to public justice or private individuals, would arise from a second prosecution, the plea will not prevent it; as where the criminal is indicted for treason after an attainder of felony, in which case the punishment will be more severe, and the forfeiture more extensive: 3 Inst. 213; Poph. 107; 4 Bl. Com. 337; Hawk. b. 2, c. 36, s. 4. So where the party attainted is concerned in another felony, as principal, he may be indicted for it, in order to prevent his accessaries from escaping: Poph. 107; 4 Bl. Com. 337; Hawk. b. 2, c. 36, s. 6. Thus he may be again indicted for former robberies, in order that the parties injured may procure the restitution of their goods under the statute: 21 Hen. VIII., c. 11; 2 Hale, 252;" Chitty Crim. Law, vol. 1, 464. It was also held that if an attainder was reversed, so as no longer to endanger the life of the party, he may be prosecuted, for any other felony, as though he had never been attainted: 2 Hale, 252. So if pardoned, the plea of *autrefois attaint* will be of no avail upon an indictment for any subsequent felony: Id.; See *contra*, 3 Inst. 213. The principle of the plea, under discussion, is stated by Bennett and Head in their "Leading Criminal Cases," vol. 1, p. 528, to have been recognized and acted upon, as late as the year 1814, in the case of *Rex v. Birkett*, Russell and Ryans C. C. 268. In that case it was held that the defendant upon whom sentence of death had been passed for a felony, could not, while under that sentence, be punished for another felony, although he failed to plead his former conviction and attainder. So in the case of *Rex v. Jennings*, Id. 388, the defendant was convicted of the manslaughter of Mary Cormack, and received the benefit of clergy. He was subsequently indicted and convicted of the manslaughter of Mary Anne Condon, by the same act that caused the death of Mary Cormack, but it was held, that the former allowance of the clergy protected the defendant against any punishment upon the second verdict. The act of parliament of 7 and 8 Geo. IV., c. 28, s. 4, provided, "that no plea setting forth any attainder, shall be pleaded in bar of any indictment, unless the attainder be for the same offense as that charged in the indictment," and by

this act, Chitty, in his notes to Blackstone's Commentaries, vol. 4, p. 338, considers the plea of *autrefois attainé* abolished. Bishop also considered the same abolished, by the act above cited. In his work on Criminal Law, vol. 1, sec. 898, 4th ed., he says: "In England it was long ago abolished by act of parliament," referring to the enactment above cited.

The doctrine referred to has seldom been followed in the United States, and the principal case, although not expressly overruled, seems to be the only adjudication in this country recognizing the same: 1 Bishop Crim. Law, sec. 898, 4th ed; *Hawkins v. State*, 1 Porter, 475; *State v. McCarty*, 1 Bay, 334; Archbold's Crim. Prac., Pomeroy's notes, 350; Bennett and Head, Leading Criminal Cases, vol. 1, p. 528, where it is said, in speaking of the doctrine above discussed, "any such doctrine, although not often expressly repudiated, is as clearly repugnant to the established principles of modern criminal law, as it is unsupported by reason." See *State v. Commissioners*, 2 Murphey (N. C.) 371. In *Hawkins v. State*, 1 Porter, 475, the defendant being on trial for horse-stealing, pleaded that subsequent to the commission of the offense for which he was being tried, he was convicted of negro-stealing, and that he had been pardoned by the governor; to this plea there was a demurrer, which was sustained, and the supreme court of Alabama, in approving that ruling, said: "Hawkins, the prisoner, was, at a recent term of the circuit court of Limestone county, convicted of the crime of horse-stealing. He pleaded in bar of this indictment that at a previous term of the said court he had been convicted of the crime of negro-stealing; that for this last-mentioned offense, he had been pardoned by the governor of the state; and that the offense for which he, the prisoner, then stood indicted, was committed, if at all, prior to the said former conviction. To this plea the solicitor demurred; the court sustained the demurrer, after which, on an issue to the country, the prisoner was found guilty, and the judgment of the court was pronounced against him. But the court reserved as novel and difficult, the question, whether or not there was error in sustaining the demurrer. It is contended for the prisoner that the offense for which he was last convicted merged in the prior felony, and that the pardon for one operated as a discharge from both. If there be anything in the common law to countenance this defense, it must rest upon the principle of attainder and corruption of blood, and the consequent forfeiture, resulting from convictions under that law. These principles require no discussion on the present occasion, as they can have no application with us, the constitution having provided against any attainder of treason or felony, and declared that "no attainder shall work corruption of blood nor forfeiture of estate." A similar question occurred in South Carolina, as early as 1795: *The State v. McCarty*, 1 Bay, 334. There, the prisoner having been convicted of horse-stealing, a motion was made in arrest of judgment on the ground that he had been convicted of a different offense subsequently committed, and had received a pardon for the same, which, it was contended, operated as a pardon for that also. After full argument on the question, and deliberate consideration by that court, the judges were unanimous in the opinion that the special pardon for the offense for which the previous conviction had taken place did not operate as a bar to the prosecution for the one then charged, or any other not particularly mentioned in the pardon. "On principle and authority, we feel quite clear," says the court, "that neither a conviction nor pardon for a particular offense can, in this state, operate as a bar or discharge of any other distinct offense." In the case of the *State v. Commissioners*, 2 Murphey (N. C.) 371, the defendants were indicted for neglect of duty, in failing to keep the streets of an incorporated town in repair, the

law provided that they were liable to an indictment for every neglect of duty, it was held that if two or more of the streets of the town were out of repair at the same time, and several indictments are found, a conviction on one of said indictments is a bar to all of the others: See *State v. Damon*, 2 Tyler, 387.

BONDS v. THE STATE.

[1 MARTIN & YERGER, 143.]

INSANITY, HOW DETERMINED.—If a prisoner convicted of murder alleges, as a reason why sentence of death should not be pronounced, that at that time he is insane, the judge may himself determine the truth or falsity of the plea, or he may submit the same to a jury.

DEPUTY CLERK may be appointed by parol, and such deputy may discharge the duties of the clerk's office.

INDICTMENT that states the grand jurors to be "good and lawful men" is sufficient, without alleging they are freeholders or householders.

The opinion states the case.

Bell and G. M. Fogg, for plaintiff in error.

A. Hays, Attorney-general, contra.

By Court, **WHYTE, J.** Duncan Bonds was indicted in the circuit court of the county of Lincoln, at its September term, in the year 1824, for the murder of Felix Crunk. To the indictment, upon his arraignment, he pleaded not guilty, and put himself upon the country, and the attorney-general did the like. The jury found the prisoner guilty of the murder, wherewith he was charged by the bill of indictment, and the circuit court passed sentence of death upon him. Whereupon the defendant, by his counsel, tendered two bills of exceptions; which being signed and sealed by the court, and made a part of the record, a writ of error was taken to this court.

The first bill of exceptions shows, that when the prisoner was led to the bar and was asked by the court if he had anything to say why sentence of death should not be pronounced upon him, in answer thereto, by his counsel, he alleged that he was at that time a lunatic, and that sentence could not be pronounced upon him; and offered to plead his lunacy in bar of the sentence; and also demanded of the court that a jury be called to try the issue of fact arising upon that plea. But the court, upon inspection of the prisoner, and upon consideration of the case, because nothing was shown to render it probable that defendant was a lunatic, or to make that matter doubtful, refused to allow the prisoner his plea aforesaid, and denied him the

privilege of a jury at this time, to try the question of his sanity or insanity, and proceeded to pronounce the sentence of death accordingly, the prisoner having nothing further to allege to the contrary.

Upon this bill of exceptions, it is contended by the defendant's counsel that there is error in this; that the circuit court refused, upon the allegation by them made, of the lunacy of the prisoner, to receive a plea of lunacy in bar of the sentence of death being pronounced at that time, and to impanel a jury to try the truth of the plea; and it was urged that this course of proceeding upon the allegation of lunacy, made by the counsel on behalf of the prisoner, was not a matter of choice or discretion with the court, but imperative, and that the allegation must be taken as true by the court, unless the fact was submitted for trial to a jury; and 1 Chitty, C. L. is cited in support of this position, where it is laid down, "the judge may, if he pleases, swear a jury to inquire, *ex officio*, whether the prisoner is really insane or merely counterfeits; and if they find the former, he is bound to reprieve him till the ensuing session." The meaning of this passage, giving it a reasonable construction, must be, that if upon the question made, the judge is not satisfied or has doubts, he may call in to his assistance the aid of a jury, and submit the matter to them. The law on this point is more fully stated in 1 Hawk, P. C. page 3, in the notes; where it is said, "every person of the age of discretion is presumed of sane memory, until the contrary appears, which may be, either by the inspection of the court, 1 Hale, 33; Tr. *per pais*, 14; O. B. 1724, No. 4; by evidence given to the jury who are charged to try the indictment: 3 Bac. Abr. 21; 1 Hale, 33, 35, 36; O. B. 1124, No. 222; or, by being a collateral issue the fact may be pleaded and replied to one term, and a venire awarded, returnable instant in the nature of an inquest of office; Inst. 46; Keil. 13; 1 Term, 61; and this method, in cases of importance, doubt, or difficulty, the court will in prudence and discretion adopt: 1 Hale, 35, 50, 56; 1 And. 154. From this it appears that inspection by the court is one of the legal modes of trying the fact of insanity; and nothing appears in the record of this case, to show that the discretion of the court, in adopting the mode pursued, was erroneously exercised. This court, therefore, is of opinion that there is no error in the matter of the first bill of exceptions.

The second bill of exceptions states that the prisoner, by his counsel, in this case excepts to the whole proceedings of this

court in this cause. They allege that there was no clerk or deputy to this court during the term. James Bright, who is the clerk of this court by appointment, having been absent during the whole term, and Benjamin W. D. Carty, by whom the usual business of the clerk has been done, being called to the book on oath, stated that he is not clerk, nor has he any written appointment under the hand and seal of Bright, the clerk, as deputy, nor has he qualified as deputy by taking oath or otherwise. But he was, before the commencement of this term, by parol, and afterwards by letter from Mr. Bright, instructed and requested to attend to the business of the office and court during his absence; he further stated, that he had done business for three years as deputy heretofore, all which is excepted to.

The argument upon this bill of exceptions is that although the office of clerk has been filled in fact, and the duties in this office performed by a deputy in that character, for the last three years, in absence of the clerk; yet, inasmuch as this deputy was only authorized by parol and by letter to officiate in the place and name of the clerk, and not by and under seal, and was not sworn into the office of deputy clerk *eo nomine*; therefore, the said term of Lincoln circuit court is to be considered as having been now without a clerk, which is erroneous.

Two points are here made: 1. Can the clerk of a circuit court appoint, or act by, a deputy? and, 2. Has a deputy been appointed by the clerk in the present case.

As to the first, the acts of assembly directing the appointment of clerks to the circuit courts, and prescribing their duties in office: See Acts of 1809, c. 47, sec. 8, and 1744, c. 1, sec. 2; are silent as to deputies, no doubt intentionally so, leaving that to the clerks themselves; dealing with the clerks only, and holding them responsible for all acts to be performed by them in virtue of the office, and, whether there is a deputy or not, looking to the clerk in all cases for responsibility in matters appertaining by law to his office. The act of 1805, c. 1, secs. 1 and 2, requiring certain acts to be done by the clerks of the courts, or their deputies, recognizes the existence of deputies, and their legal capability of performing the duties of the office of their principals. And no good reason appears in the present case why the clerk of the circuit court may not discharge the duties of his office, during term time, by deputy or substitute, especially those duties that are purely of a ministerial nature, such as appear to be performed in this record.

As to the second point, it has not been shown that a deputation, under the hand and seal of the clerk of the circuit court, is necessary by our acts of assembly, to the constituting or appointing of a deputy, or that an oath of office is necessary for this purpose. In England, where an official oath is a requisite for a deputy, the qualification is introduced by statute: 6 Bac. Abr. 150. Nor does it appear to be necessary that the appointment of deputy clerk should be by deed, on account of the public interest. The matter of appointment is between the principal and deputy. Whether the contract of substitution is by parol or by deed, is of no concern to the public; the due and faithful performance of the duty is well secured by the bonds of the principal. Besides, during term time, the ministerial acts of the clerks are immediately under the inspection, control, and direction of the court, subject to revision every day, and thereby well secured against operating either to public or individual injury. It was further objected by the defendant's counsel, that it did not appear that the grand jurors were freeholders or householders. The record shows that they were good and lawful men; which comprehends every necessary qualification in such case prescribed by law. It might be further observed, that as this indictment was found in a superior court, the statement of "good and lawful men," does not even seem to be absolutely essential: 1 Chitty C. L. 333; 2 Hawk. c. 25, sec. 126.

It is the opinion of the court that there is no error in this record.

Judgment affirmed.

See, generally, as to what persons are competent witnesses to testify to the insanity of a person: *Rambler v. Tryon*, 10 Am. Dec. 444, note 449.

SMITH T. v. BELL.

[1 MARTIN & YERGER, 302.]

REMAINDER, WHEN VOID, AS REPUGNANT TO THE FIRST ESTATE GRANTED.—

A bequest to a person of certain personal property, with the power of disposal, vests the same absolutely in the first legatee, and a remainder over to another person of what remains of the property at the death of the first legatee, is repugnant to the first estate granted, and void.

BILL in equity by Smith T., assignee of Jesse G., to prevent Robert Bell and Elizabeth Bell, his wife, formerly Elizabeth Goodwin, from disposing of certain personalty, bequeathed to

the latter by Brittain Goodwin. The chancellor dismissed the bill.

The other facts appear from the opinion.

Hugh L. White, for appellant. Peck, 102; 1 P. Wms. 651.

Jarnegan and G. S. Yerger, contra. 1. The bequest to Elizabeth Goodwin vested the entire interest in the personal property in her, with an absolute power to dispose of the same: Cruise's Digest, title Devise, ch. 11, secs. 11, 12, 16; 7 East, 259; 8 Cranch, 97; Cowper, 355, 659; 2 P. Wms. 524; 1 Johns. Digest, 508. 2. The remainder over to Jesse Goodwin is absolutely repugnant to the first estate created, and consequently void: 2 Fearne Con. Rem. 226; 4 Bac. Abr. 292; 10 Johns. 19; *Jackson v. Bull*, 6 Am. Dec. 321; 15 Johns. 169; 16 Johns. 584; 5 Mass. 500; *Ross v. Ross*, 1 Jac. & W. 154.

CATRON, J. The only question presented for the consideration of the court in this cause is, what is the construction of the following bequests in the will of Brittain Goodwin, deceased:

"I give and bequeath unto my son, Jesse Goodwin, my young sorrel gelding and one feather bed, to be delivered to him by my executrix, after my decease. Also, I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what nature, kind, and quality soever, after payment of all my just debts, legacies, and funeral expenses; which personal estate I give and bequeath unto my wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely. The remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin."

Did the testator intend by his will to vest in his wife Elizabeth an estate for life only, and after her death that Jesse should take the remainder of the estate in the property? Or, did he intend that his wife Elizabeth should have the power to sell and dispose of the same during her life-time; and if any of the property was undisposed of by said Elizabeth at her death, and went to her executors, that Jesse should have what was so left undisposed of?

In coming at the true intention of the testator, the court can be much aided by legal principles applicable to trust and absolute estates.

1. It is a settled principle, that a valid executory devise is such an one as cannot be defeated at the will and pleasure of the

first taker (say Elizabeth) by sale, or any other mode of alienation: *Attorney-general v. Hall*, Fitzgibbon, 314, cited 10 Johns. 20; *Jackson v. Bull*, 10 John. 19 [6 Am. Dec. 321]; *Jackson v. Robins*, 15 Id. 169; 16 Id. 571, 584; 1 P. Wms. 584; *Moffat v. Strong*, 10 Johns. 17; *Ross v. Ross*, 1 Swanston¹; *Ide v. Ide*, 5 Mass. 500.

The devisee, the first taker, has a use only of the property devised during life, if the executory devise is good. But if the first taker is given an absolute estate in the property devised, then the limitation over is void, being inconsistent with the interest given to the first taker, which was the entire estate, and consequently nothing remains for the second taker.

2. If the first taker, Elizabeth Goodwin, could exercise absolute control over the property by selling the same, and vesting in the purchaser an indefeasible title, it would then be useless for the law to recognize and guard with anxiety an executory devise that it could not preserve for the remainder man.

3. It is a rule, upon which this bill is grounded, that where there is a remainder over, by way of executory devise, the property is unalienable in the hands of the first taker, as above laid down; and should he attempt to sell, or in any other mode waste or misuse the property, so as to threaten its destruction, the court will impound it; that is, take it into the hands of the court, by its officer, and give the first taker the profits. Our practice has been to require security for the lawful use of the property during the life estate, and if this is not given, then pursue the mode of seizing upon the property: See 3 Vesey, 7; 2 Id. 333, 529; 18 Id. 41. Security has been given for the preservation of the property in the present instance.

If the first taker has power, during his life, to dispose of the property absolutely, it is not within the power of the court to interfere for the preservation of it during the life estate. In all such cases, the rule is, that the devise over is void, and that the first taker has the estate in fee. In this construction no distinction has been made between goods and lands: *Jackson v. Bull*, 10 Johns. 21 [6 Am. Dec. 321], where the rule is well laid down by the supreme court of New York.

Here a rule of law interposes, which controls the intention of the testator; for although the devise, in plain terms, is, that he gives to A., to be disposed of by him, during his life, at his will and pleasure; but that such part of the property as may be un-

1. See *Ross v. Reynolds*, 1 Swanst. 446.

disposed of at his death, shall go in remainder to B. Yet B. shall take nothing, although the whole property and estate devised remain in A. at his death; for the reason that it is out of the powers of a court of chancery to govern the discretion in A., the first taker; and hence such an executory devise has uniformly been pronounced void, 16 Johns. 571.

“When a principle is settled,” says Lord Mansfield, Cowper, 355, “no conjecture, or private imagination, can shake a rule of law—which must govern.”

To apply the rules above laid down to the case before the court, it is admitted that the clause in Brittain Goodwin’s will would have vested in his wife an absolute estate; and that it gives her the power, as devisee, to dispose of the whole estate in the property devised, when not taken in connection with what follows: “The remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin.” It is argued that this clause cuts down the estate of the wife to the mere use of the property during life, without any power in her to alien the same; that the court can seize thereon, should she attempt to sell, and preserve it for Jesse, by impounding it.

To test this principle let us put a case. Suppose Elizabeth Goodwin had, in her life-time (for she is now dead), sold one or more of the slaves to a third person, *bona fide*; Jesse Goodwin, after her death, had brought detinue against the purchaser for the slave, relying upon the executory devise in the will of Brittain Goodwin—could he recover? The court thinks not, and for this reason, because Brittain Goodwin intended, by his will, to give his wife his personal property absolutely, to be disposed of by her, according to her will and pleasure, by sale or otherwise; but that if any part of the property “remained,” that is, was undisposed of by her at her death, Jesse Goodwin was to be entitled to the same; hence, by law, the executory devise in Jesse’s favor is void, and the bill must be dismissed.

Whether the assignment of his interest to Smith, the complainant, by Jesse Goodwin, authorized the former to prosecute this suit as assignee, has not been examined by the court; the defendant’s counsel waiving this point, and requesting that the cause should be decided on its merits.

The court has given mature consideration to the opinion of Judge Haywood (reported in Peck, 102), delivered in this cause at a former term; and duly appreciates the talents and learning of that distinguished judge; but feels itself constrained,

by authority, and what is believed to have been the intent of the testator, to dissent therefrom.

In this appeal from the judgment of the chancery court, only three of the judges now, in fact, constituting this court, could sit upon its hearing above; one of the present judges was disinclined to affirm the opinion of the chancellor; the other two sitting members were of opinion it ought to be affirmed; when the question arose upon the construction of the statute of 1824, which provides "that there shall be the concurrence of three judges to make a decision, except in cases of appeal from the courts of chancery, in which appeals the judge who decided the cause below shall not sit, and if the court (meaning the four other judges) are equally divided, the judgment of the chancellor shall be affirmed." The whole court adjudge, that where there are three judges sitting upon the hearing of an appeal from the chancery court, and two are favorable to affirming the decree, and one is of opinion that it should be reversed, the decree shall be affirmed; for the reason, that if the fifth judge was in his place, and favorable to a reversal, yet the two judges concurring with the chancellor could affirm. Therefore, the judgment must be affirmed.

Decree affirmed.

PERSONALTY—MAY BE LIMITED OVER BY WAY OF REMAINDER.—That personal property may be limited over by way of remainder, after a bequest of the same for life, is now too well settled to be denied: *Smith v. Gates*, 1 Am. Dec. 89, note 90; *Griggs v. Dodge*, 2 Id. 82, note 86; *Westcott v. Cady*, 9 Id. 306. In the latter case, Chancellor Kent, in sustaining a limitation over, by way of remainder, in certain personalty mentioned, after a bequest of the same for life, uses the following language: "The law is too well settled to be drawn in question at this late day, that a limitation of personal goods, and chattels or money in remainder, after a bequest for life, is good:" See his opinion at page 309, and cases there cited.

The correctness of the rule as stated by Chancellor Kent, was admitted in the principal case, but the facts of that case showed that the absolute power of alienation was given to the first taker, and to have upheld the limitation over would have been, in effect, to restrain the absolute power of limitation, consequently the limitation was adjudged void: See *Jackson v. Bull*, 6 Am. Dec. 321.

WHITE v. DOUGHERTY.

[1 MARTIN & YERGER, 809.]

A PRIOR MORTGAGEE, with notice of a subsequent mortgage, holds the balance of the fund derived from a sale of the mortgaged premises, over and above his mortgage, in trust for the subsequent mortgagee.

PARTNERSHIP PROPERTY — CREDITORS OF A PARTNERSHIP have in equity a lien upon the partnership property, and they are entitled to have their claims satisfied out of the partnership effects, in preference to the creditors of an individual member of the firm.

A PARTNER'S INTEREST IN PARTNERSHIP PROPERTY is his share, after the firm debts are paid; and an individual creditor of such partner can only acquire a lien on such interest. If the partnership is insolvent, there is no interest upon which he can acquire a lien.

PARTNERSHIP CREDITORS, having a lien on the separate property of one of its members, must, if the firm is insolvent, exhaust his separate lien, before he comes in with other creditors for a share of the partnership effects.

PURCHASER FOR VALUE, without notice of an equitable lien, holds the property discharged of the lien.

VENDOR'S LIEN, HOW WAIVED.—The taking of new and distinct security for the payment of the purchase-money waives the lien that a vendor has upon the property sold for the payment of the purchase-price.

BILL in equity. The chancellor dismissed the bill. The other facts appear from the opinion.

• *Green and Gibbs*, for complainant.

James Campbell and Isacks, contra. The creditors of the firm have a lien on the effects, and neither partner separately has any interest therein, except his share of the undivided surplus after all the debts are paid: *Watson on partnerships*, 100, 101; 1 *Ves.* 279; 4 *Id.* 796; 4 *Johns. Ch.* 552.

By Court, **CRABB, J.** The defendants, John and George Dougherty, became partners in trade and merchandise, in 1815; they were embarrassed in 1819, and on the first of January, 1820, were insolvent to the amount of eight or ten thousand dollars beyond their means of payment. The firm owed large debts to creditors in the Atlantic cities; and to the branch of the Nashville bank at Winchester about twelve thousand dollars. The defendants, Miller and Woodses, were their accommodation indorsers for the latter sum to the bank. John Dougherty was individually indebted to the complainant, James White, about six thousand dollars. In the latter part of the year 1819, John and George Dougherty sold goods to Herbert and Kyle, of Huntsville, to the value of about eleven thousand dollars, and took their notes for the amount. These they pledged to Miller for the security of himself and the Woodses. Whether that was a permanent or a temporary pledge is one question of fact disputed by the parties.

The Doughertys also assigned to their indorsers, Miller and others, for their additional security, stock in the bank to the

nominal amount of about six thousand dollars. On the eighth day of January, 1820, John Dougherty mortgaged to the indorsers, for their security, two town lots in Winchester, his individual property.

On the twentieth of the same month, complainant and John Dougherty signed in Winchester a memorandum in the following words:

“I am willing to wait for the amount of my debt from Major Dougherty five years, carrying interest from the date. Major Dougherty proposes to include my debt in a mortgage with T. Miller, Archibald Woods, and W. Woods, who hold debts on Herbert and Kyle to the amount of eleven thousand and fifty dollars, the real property in Winchester, and the stock, in the Winchester bank, out of which property they are bound to pay twelve thousand dollars. The balance of the above property will then be for the security of my debt. This twentieth of January, 1820.

“JAMES WHITE,

“JOHN DOUGHERTY.”

The complainant then left Winchester, and the next day John Dougherty executed and delivered to complainant's agent, who received it, a deed of mortgage for the same two lots which had been mortgaged to Miller and others, with three other lots in the same town. The deed describes the two lots as “being the same specified in a mortgage executed for the same to Archibald Woods, William Woods, and Thomas Miller, dated on the eighth instant.”

The complainant affirms that Miller had notice soon afterwards of the agreement evidenced by the above memorandum, and of the lien he says he acquired by means of it. The defendants deny that they had any notice until after the notes were disposed of as hereinafter mentioned. Hence arises another disputed question of fact. Afterwards, but when, the parties do not agree, nor does the evidence precisely specify, Herbert and Kyle's notes, pledged to Miller, were surrendered by him, at the instance of the Doughertys, to their joint creditors, and the amount was subsequently paid to them. It does not appear that the two lots and the bank stock are more than a sufficient, and defendants allege them to be, a slender security for their liabilities.

Complainant insists that the defendant, Miller, acted iniquitously in giving up the notes on Herbert and Kyle to the east-

ern creditors; and for that reason his lien, as a prior mortgagee of the two lots, should be postponed in equity to his own. And, beyond all doubt, if the fact were that Miller had the first claim to security by mortgage and pledge on certain property, and complainant a second mortgage or security on the same, of which Miller had notice, and if there were no other persons having a better claim than complainant, Miller would hold the excess beyond the satisfaction of his own claim, as a trustee for the benefit of complainant, and a court of equity would hold him accountable for a disposition of that excess to the prejudice of complainant.

1. Let us then, first, take it for granted that it was the intention of John Dougherty and complainant, by the instrument of the twentieth of January, and the mortgage of the twenty-first, to give complainant a lien on Herbert and Kyle's notes and the bank stock, in addition to the two town lots, second only to the lien of Miller and his associates, to the amount of twelve thousand dollars, and that the instrument relied on was effectual for that purpose, so far as they could make it effectual, and that Miller was apprised of it before he delivered over the notes of Herbert and Kyle to the other joint creditors; was the subsequent act of delivering up the notes to them, such a wrong committed by Miller towards White, as a court of equity can redress?

Leaving the complainant for a moment out of view, how would the equities stand between the other joint creditors, and Miller and others?

That the joint creditors of a partnership have, in equity, a general lien on the funds of the partnership, and that in case of insolvency they are to be preferred to the creditors of an individual member of the firm, is at this day too firmly settled to be questioned: 1 Ves. 239; *Field v. Taylor*, 4 Id. 396;¹ 6 Mass. 242; 2 Johns. 280; 4 Johns. Ch. 522; 20 Johns. 611.

The other joint creditors then say to Miller and the Woodses, we are all joint creditors; we have all a general lien on the partnership funds; there is not enough to pay us by eight or ten thousand dollars; we do not claim a participation with you in the additional specific lien that you have, by your superior vigilance, acquired on the two lots; but we ask that you will exhaust that fund before you commence a diminution of the already insufficient fund, to which alone we can have recourse under the circumstances—the partnership property.

1. *Taylor v. Fields*, 4 Ves. 396.

Could Miller resist such a demand in a court of equity? We take it to be clear that he could not. It is an established general rule of equity, that where two ascertained creditors have one fund common and open to both, and one has a second fund to which the other can not resort, the former shall exhaust his separate fund before he shares in the common one: *Everston v. Booth*, 19 Johns. 63;¹ *Hawley v. Mancius*, 7 Johns. Ch. 184; 17 Ves. 520.

There are some exceptions to this rule, of which the supposed case would not be one. There would be peculiar propriety in applying the general rule to the case supposed, as both of the funds, namely, the joint property and the individual property, or, in other words, both John and George Dougherty, and John Dougherty would, independently of specific liens, be equally liable to the claims of all the joint creditors, both to the plaintiffs in the supposed application, and to Miller and others, the supposed defendants.

If a court of equity would have compelled Miller to surrender Herbert and Kyle's notes to other joint creditors, they having ascertained their demands by judgment, upon its being seen that Miller had a sufficient separate fund to secure him, it can not be said he acted unconscientiously by doing the same thing without its decree. That the creditors who got them are *bona fide* creditors, is not contested, though it does not appear that their demands were ascertained by judgment. Indeed, it is expressly admitted that there was, and is, a deficiency of joint means to discharge joint liabilities to the extent of eight or ten thousand dollars.

The complainant, however, here interposes his claim, and says that he has a lien on the lots, stock, and notes. Admit it. When did it originate? On the twentieth of January. To this, the joint creditors answer, as to the notes and other joint property, we had a lien of a prior date, a general lien on all the partnership property, and there is not enough to pay us.

Miller and Woods answer as to the two lots, and say, we too had a lien of a prior date, which originated on the eighth of January. And they all answer, when we exhaust the value of the lots, and all the joint property, there is still a part of the joint debt unpaid.

There seems to have been a sort of vague idea in the mind of the complainant, that as the creditors of John and George Dougherty were entitled to a preference over him as to the joint

1. *Everton v. Booth*, 19 Johns. R. 486.

property, he, as a creditor of John Dougherty, was entitled to a similar preference over them as to the individual property of John, notwithstanding some of the joint creditors had a prior specific lien on it. In this he is wholly mistaken. There is no legal foundation for such a preference. The liabilities of partners are joint and several. John Dougherty was as much the debtor, or as likely to be the debtor of Miller, as he was of White. They were running a race, and *qui prior est in tempore potior est in jure*.

2. Supposing that John Dougherty possessed the legal right on the twentieth of January to dispose of the Herbert and Kyle notes, and the bank stock, to the prejudice of the joint creditors of himself and partner, did he do so?

The instrument of that date is not very clear and definite in its terms. At least it is incomplete in its character, and contemplates the subsequent fulfillment of what it only proposes. We must look to the mortgage deed of the next day for that fulfillment. One of the partners had the day before rashly promised what he then thought it improper to perform; and what this court think he should neither have promised nor performed, to dispose of a large portion of the partnership property without the consent of his co-partner; or without the consent of his joint creditors, to pay or secure an individual debt of his own. On the twenty-first he executed a mortgage deed, in which none of the joint property was included, but conveying the two lots in Winchester, probably in lieu of the excluded property. This deed was accepted by complainant's agent, and the arrangement acquiesced in by himself. We think the complainant had no lien beyond the terms of the mortgage.

It is not thought necessary to examine very particularly whether the defendant, Miller, had notice of the instrument of the twentieth. Because, as we do not consider the arrangement then proposed to have been consummated, nothing obligatory existed of which notice could be given. And it will not be pretended that notice would vary the effect of the instrument itself, and make it communicate an interest, if, without notice, it would communicate nothing. We should require to be much better satisfied than we are, however, before we should be prepared to say, in opposition to the direct denial in Miller's answer, that he had the alleged notice.

The complainant relies on another ground. He and John Dougherty were once partners in merchandise. They dissolved their partnership on the sixth day of July, 1815, and by the deed of dissolution, complainant "relinquished to said Dougherty

all his interest in both of the said firms, including real property as well as all other, which then belonged to either of said firms." Complainant says, that his legal interest in an undivided moiety of the real estate, did not pass by this deed, and that therefore he can now maintain this bill. This averment comes with but a bad grace from the complainant, after he has permitted John Dougherty to remain in undisturbed possession for some years, under the deed of partition, and by that means enabled him to make conveyances to innocent purchasers; but more especially, after he has himself expressly recognized the estate in fee of Dougherty, by himself accepting from him a mortgage in fee, as the bargainee of a legal title. This is manifestly an after thought, first introduced in an amendment of his bill, contrary to the scope, frame, and nature of his first complaint.

But a sufficient answer of itself to the proposition is that complainant, if he be correct, need not come into this court. Let him go into a court of law, and there set up his supposed legal title to an undivided moiety against the persons having the adverse possession. Upon what principle can it be seriously insisted that a court of equity would indulge a complainant actually asserting such a claim, directly in the face of his own deed, relinquishing all right? Did he even come for a partition, as he does not, he would be told, in such a case, first to establish his title at law: 1 Johns. Ch. 117; 4 Id. 276.

But again, it is said that if the legal title passed by the deed of dissolution, the plaintiff has, as vendor, a lien on the lots for the consideration money. There are several reasons why he cannot successfully assert such a lien.

A sufficient one is, that Miller and others were purchasers without notice of any lien from anything that appears: Sugden on Ven., and authorities there cited, 398; 7 Wheat. 46; 3 Hay. 195.

Again, by complainant's own showing, he has waived such a lien, if he had it, by taking distinct and independent securities: *Brown v. Gilman*, Sugden, 387; 4 Wheat. 255, 292. Besides taking a mortgage on these, he took a mortgage on three other lots.

We are of opinion that the decree of the court of equity, dismissing the complainant's bill, ought to be affirmed.

PARTNERSHIP PROPERTY.—Liable for partner's debts, when. See note to *Dob v. Halsey*, 8 Am. Dec. 297.

VENDOR'S LIEN.—Not enforced against purchaser without notice: *Dural v. Bibbs*, 4 Am. Dec. 506; *Lagow v. Badollet*, 12 Id. 258, note 262. See also, as to a waiver and transfer of the lien, Id. 263.

COCKE v. MCGINNIS.

[1 MARTIN & YERGER, 361.]

STATUTES OF LIMITATIONS.—Courts of equity, acting by analogy, will, in all proceedings where they have concurrent jurisdiction with courts of law, apply statutes of limitations, and refuse to grant relief when it appears that the statutory period upon which an action might have been maintained at law has elapsed.

STATUTES OF LIMITATIONS—CONSTRUCTION OF.—General words in a statute of limitations must receive a general construction, and if there be no express exception, the court can make none.

PLAINTIFFS sued defendant, administrator of Stone, deceased, for money received by Stone in his life-time, to their use. Pleas: 1. Non-assumpsit; 2. That Stone did not promise within three years; 3. Fully administered. On appeal from Grain-ger county to the circuit court, plaintiff, upon leave obtained, replied specially to the plea of the statute of limitation, "that Stone, in his life-time acting as agent for plaintiff, collected moneys of plaintiff, and fraudulently concealed from plaintiff the fact of the receipt of the same until within three years before the bringing of this action." To this plea there was a general demurrer, which was overruled, and judgment entered for plaintiff.

By Court, CATRON, J. The single question to be decided by the court is, whether the replication is a good answer to the plea of the statute of limitations.

1. It is contended, on the part of the defendants in error, that Stone received the money as agent, in the capacity of gate-keeper, and held the same as a trustee; that the relation of trustee and *cestui que trust* existed between him and the plaintiff below, and that Stone's possession of the money was consistent with the right of Jack and Cocke, and therefore the act of limitations did not run in favor of Stone.

The statute of 1715, c. 27, sec. 5, says, "that actions upon the case shall be commenced or brought within three years next after the cause of such action or suit, and not after." All comment upon this forcible and unambiguous language can but obscure it. What was the cause of this suit? The receiving of the money by Stone. Instantly on his receiving any part of the money a right of action accrued to Cocke and Jack; and within three years after such cause of action, the defendants in error were bound to sue, or their action was barred.

The history of English jurisprudence, it is believed, furnishes

not an instance where it was holden that the relation of *cestui que trust* and trustee prevents the statute from creating a bar in a case where an action at law can be sustained. In every case where an action of assumpsit will lie, there even courts of chancery, having concurrent jurisdiction with courts of law, will apply the statute. This has been the settled rule of decision in the English chancery courts for a century: *Locey v. Locey*,¹ by Lord Macclesfield, 1719; Prec. in Ch. 518. The rule is followed and distinctly laid down in *Street v. Mellish*, 2 Atkins, 610;² is recognized and commented upon in the very able opinion of Lord Redesdale in *Hovenden v. Amesley*, 2 Sch. & Lef. 607. The cases are all brought together by Chancellor Kent in the cause of *Kane v. Bloodgood*, 7 Johns. Ch. 111 [11 Am. Dec. 417], where the chancellor repudiates the doctrine held by him in the cause of *Coster v. Murray*, 5 Johns. Ch. 522. The latter case had, upon appeal to the supreme court, been overruled; which decision, overruling Chancellor Kent's opinion, is reported in 20 Johnson's Reports, 576, 610. In the above causes the true rule is laid down, that courts of equity will apply the statute to all cases, unless it be such as are predicated upon a naked trust, in which courts of equity have alone jurisdiction, and of which courts of law have no cognizance. Hence the bringing of the suit at law in this cause was conclusive that the claim sued for was of such a character as to be barred by the statute of limitations. This position is, therefore, untenable.

2. It is contended that the concealment of the receipt of the money by Stone, as set forth in the replication, is a good answer to the plea of the statute of limitations; and that a fraudulent concealment of the cause of action formed an exception in favor of the defendants in error until they discovered the fraud. Here, again, it is believed the words of the statute are too plain for construction to afford any aid to the mind not affected by unmeaning refinement. "The suit shall be brought within three years next after the cause of action," says the statute. Was the discovery that the money had been fraudulently concealed by Stone "cause of action?" This it certainly could not be. The declaration informs us that the receipt of the money to Cocke and Jack's use, by Stone, was the cause of action; and the statute tells us that within three years next after the receipt of the money the suit must have been brought or the action was barred. The replication admits the cause of

1. *Locey v. Locey*.2. *Stuart v. Mellish*, 2 Atkins, 610.

action to have existed more than three years before the suit brought, by in effect confessing the plea to be true. But it is insisted that the fraudulent concealment put it out of the power of the plaintiffs, Cocke and Jack, to sue, and therefore there is an implied exception in their favor, which is equally strong with the express exceptions in favor of those who are infants, *femes-covert*, *non compos*, imprisoned, or beyond the seas. And this brings us directly to the question, whether the courts have power to make exceptions to the affirmative and positive enactments of a statute, in cases where the legislature has made none? I am well convinced that this court has no such power; that it is our duty to administer the law, regardless of particular cases of hardship, and that it belongs exclusively to the legislature to alter the law, if it is oppressive or inconvenient. It is believed that such has been the course of decision, with slight aberrations, in reference to the act of limitations, for centuries. The case of *Stowell v. Lord Zouch*, in Plowden, lays down the principle that when the statute once begins to run, it runs on; and that the courts have no power to make an exception in favor of a disabled person upon whom the estate is cast, the next day after the statute commences its operation.

The courts being shut by a civil war, or there being no courts of justice in which suit can be brought, is no good replication to the plea of the act of limitations: 4 Bac. Abr. by Gwillim, 480; 2 Salk. 420.

Hence it was that the statute of William and Mary was passed declaring the time from the tenth of December, 1687, to the twelfth of March, 1688, should not be accounted any part of the time within which an action might have been brought, there having been no government from the time of the departure of King James until King William assumed the government.

The very act under consideration was suspended in its operation by the act of 1783, c. 4, sec. 9, from the fourth of July, 1776, to the first of June, 1784. The act of 1794, c. 1, sec. 40, 73, made similar provisions; and a similar provision in principle was made by the act of 1813, c. 2, in favor of those who entered the service of the United States during the last American war. These statutes are conclusive recognitions of the principle, that the legislature alone can make the exceptions; and that none prevail but such as have, from time to time, been declared by legislative enactment, either in the body of the act itself or by subsequent statutes. The English courts, in the late cases of *Bartley v. Fortner*, and *Short v. McCartney*, reported in the 5th

vol. Brod. & Bing., recognized the principle, nor has there ever been any departure therefrom, so far as my knowledge extends, in the common law courts of that country, with the single exception of a dictum in the case of *Bree v. Holbek*, in Douglass.

The decisions, so far as they are known, made by some of the most respectable courts in the United States hold a similar doctrine. The supreme court of the United States, in the cause of *McIver v. Ragan*, 2 Wheat. 29, says: "Whenever the situation of the party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception; it would be going far for this court to add to these exceptions." This case is entitled to much respect, and is conclusive on the one before this court, were it a binding authority.

The point has lately been very ably considered by the supreme court of New York, in the case of *Troup v. Smith*, 20 Johns. 33, in which Chief Justice Spencer examines the doctrine at some length, and the court decides in conformity to the above opinion of the supreme court of the United States. The case in New York was, in its circumstances, somewhat like the present, and in principle the same.

The supreme court of Virginia, in the case of *Callis v. Waddy*, in 2 Munf. 511, have also decided that fraud and want of knowledge of its commission, until after the plaintiff was barred, was not a good replication to the statute of limitations.

In North Carolina the course of decision had been thought to be contrary to the decisions last recited; but the point came directly before their supreme court, in the cause of *Hamilton v. Smith*, 1 Murp. 115,¹ where the court overrules all the former adjudications that militate against the decisions of the English courts, and fully recognize the principle that the courts have no power to make exceptions to the statute where the legislature has made none.

It is contended, however, that the supreme court of this state, in the cause of *Blanton and Coulson*, reported in 3 Hayw., have settled the law that such replication as the present is a good answer to the plea. The point now before the court did not arise in *Blanton and Coulson*.² In that cause the plaintiff, Blanton, declared in trover against Coulson for a negro; Coulson pleaded the statute of limitations; to which plea the defend-

1. *Hamilton v. Shepperd*, 3 Murp. 115.

2. *Coulson v. Blanton*, 3 Hayw. 152.

ant's counsel replied in these words: "Replication and issue." On the trial in the circuit court, Coulson proved possession of the negro by himself for fifteen years and upwards; in answer to which the plaintiff offered to prove that the negro had been run off from the state of Virginia, and that he had no knowledge where she was, until within three years next before bringing of the suit. This evidence was objected to on the part of the defendant, but received by the court; and the plaintiff had a verdict. A bill of exceptions was taken and a writ of error to the supreme court; and the only point decided by the court was, that the circuit judge erred in permitting the evidence to avoid the effect of the plea of the statute under the general replication; for this reason the judgment was reversed, and the cause remanded. The court had adopted the practice about that time of ordering a repleader, upon the record of reversal, and did so in that cause; but they after rejected the practice as erroneous. What is said, therefore, upon the replication directed to be filed in the cause of *Blanton v. Coulson*,¹ is a mere dictum, not warranted by anything upon the record that was before the court; and, consequently, only a highly respectable opinion, but no authority; nor is it believed that it ever was intended as such. I was of counsel in said cause, and well remember the facts in the record.

I, therefore, both upon principle and authority, believe the replication no answer to the plea of the statute of limitations, and think the demurrer should be sustained and judgment entered for the defendant below.

COURTS OF EQUITY are bound by statutes of limitations, the same as courts of law: *Turnpike Corporation v. Field*, 3 Am. Dec. 124; *Shelby v. Shelby*, 5 Id. 686, note, 691; *Kane v. Bloodgood*, 11 Id. 417; *Frame v. Kenny*, 12 Id. 367.

SMILEY v. BELL.

[1 MARTIN & YERGER, 378.]

COURTS OF EQUITY, JURISDICTION OF, in matters of accounts, depends upon whether the same are mutual and complicated; if not, jurisdiction will not be entertained.

ACTIONS ABATED BY DEATH—WHEN REVIVED BY A BILL IN EQUITY.—Where, during the pendency of an action, in the name of an assignor of a claim for the benefit of an assignee, the former dies, a bill in equity will not be entertained by the assignee to revive the action, on the ground that no person would administer upon the assignor's estate, in consequence of its embarrassed and insolvent condition.

1. *Coulson v. Blanton*.

THE facts appear from the opinion. Bill in equity.

Washington, for plaintiff.

F. B. Fogg, contra.

By Court, CATRON, J. Christopher Stump assigned to Robert Smiley an open account on Montgomery Bell (the defendant) in discharge of a debt due Smiley from Stump. Suit was brought in the Davidson county court, in the name of Stump, against Bell, for the use of Smiley. Judgment was recovered against Bell in the county court. He, by certiorari, removed the cause into the circuit court. Whilst pending there, Stump died. Afterwards, Robert Smiley filed his bill in equity, alleging that no one had administered on Stump's estate, nor would probably do so, owing to its embarrassed situation, and that he would not administer, nor could this reasonably be required of him, for the reason that the administrator would be greatly harassed by the numerous outstanding claims against Stump's estate. After the bill was filed, Smiley died, and his administratrix revived the suit. Bell, in his answer, insists upon the want of jurisdiction in a court of equity to give complainant relief, amongst other matters.

Whether a bill in equity could be sustained, as between Stump and Bell, upon the account, rests upon facts. It is very doubtful, from anything appearing in the pleadings and proofs, whether such mutual and complicated accounts existed on the respective sides as to give a court of equity original jurisdiction, by bill, as a substitute for the obsolete action of account. This doubt arises, taking the bill and answer together, but if the bill had been demurred to, it is very clear that no mutual dealings existed of a character to give a court of equity jurisdiction. The account exhibited with the bill, shows only two payments of one hundred and forty-five dollars, and thirty-six dollars in castings, by Bell, and the balance is stated at eight hundred and ninety-five dollars. If a court of equity were to assume jurisdiction in such a case, there would be an end to the action of assumpsit in every instance where there had been a single payment on the part of the defendant, did the creditor choose to proceed in equity. Bell, in his answer, claims further credits, but on the hearing below, gave no proof of any account on his part against Stump. This answer produces difficulties on the head of jurisdiction, and the court would encourage demurrers in such cases; this would reduce the expenses of litigation, be productive of dispatch, and, what is of still more consequence, reduce the rules

by which a court of equity is governed to a science. The court would, however, be inclined to dismiss the bill for want of jurisdiction, were there proper parties before the court, upon the ground that the remedy is at law. 6 Ves. 136; 1 Johns. Ch. 463.

The main question in the cause is, Can the court take jurisdiction, supposing the claim, as between Stump and Bell, was of an equitable nature?

It is urged for complainant, that the great difficulties imposed upon Smiley, owing to the very embarrassed situation of Stump's estate, authorized him to seek his remedy in equity, there being none at law; and that his assignment of the account on Bell gave him the benefit of this remedy in his own name after Stump's death. As between assignor and assignee of a chose in action, courts of equity have protected the rights of the latter against the acts of the former, tending to deprive the assignee of such rights; but that a cause of action could be assigned, other than in cases expressly provided for by statute, is not believed to be a position that can be maintained; nor is death an accident that will give jurisdiction to a court of equity, where the remedy is suspended by the death of him who had the right of action, and no impediment exists to obtaining administration: *Jones v. Frost, Steadman, and others*, 3 Madd. Ch. 1, 7; *Lowe and others v. Tarley and others*, 1 Id. 101, 105;¹ *Humphreys v. Humphreys*, 3 P. Wms. 349; 1 Eq. Ca. Abr. 73; 6 Ves. 118, 119; *Lee v. The Bank of England*, 8 Ves. 44.

A receiver will be appointed until administration can be granted where it is in litigation, or other impediments exist: 1 Ves. & B. 85, 96; 1 Ball & B. 326. But the complainant did not come into court claiming relief upon this head of equitable jurisdiction; therefore, the doctrine does not apply to the allegations in the bill. Many reasons obtain why the administrator of the deceased should be before the court, growing out of legal priorities in the distribution of assets, the impossibility of the court passing any decree which would be binding upon any future administrator of the assignor, Stump. Suppose some one were to administer upon his estate, and revive the suit in the circuit court, or (if this could not be done by reason of the abatement of the appeal), the judgment in the county court, and the defendant, Bell, were to plead in bar the recovery of the claim by the assignee in a court of equity; could not the administrator allege, and successfully, that his rights could not

1. Not to be found.

have been affected by such *ex parte* decree, that he denied any assignment had ever been made from Stump to Smiley of the account on Bell? There can be no doubt that this would be a good reason why the plea of the former recovery in equity would be rejected, and Bell compelled again to pay the money. Hence, were this cause of equitable cognizance, it could not be proceeded in for want of proper parties being before the court; the equities between Stump's and Smiley's estates must be adjudicated upon, if a decree is given for the complainant; the court must judicially ascertain the validity and existence of the assignment from Stump to Smiley, before any relief can be given to complainant; this previous question it is impossible that the court should decide, unless Stump or his representatives were before the court, and any decree made affecting this point, as above remarked, would be merely void, so far as Stump's representatives might be interested to object to it at a future day: 6 Ves. 118.

It is admitted that if complainant had any right to administer upon the estate of Stump, and had done so, the remedy would have been plain, and none of the foregoing inconveniences would have stood in the way. That Robert Smiley, or complainant, had a right to administer, there can be no doubt; but it is contended that it would be most unreasonable to require this, because of the very embarrassed situation of the estate of Stump. According to this argument, whether the estate was much or little embarrassed of course should be a matter of fact, and judicially to be inquired of previous to the assumption of jurisdiction by a court of equity; if unreasonable that the complainant should administer, then the court would relieve; if reasonable, then the bill would be dismissed. To limit such a discretion in a chancellor within any sensible rule, would be next to impossible; aside from the considerations that it would present an issue disconnected with the merits of the cause, and most complicated in the details of proof to make it out. When adduced, the evidence might be very satisfactory to a timid mind, appalled by slight difficulties, but entirely unconvincing to the mind of a bold and energetic man. Hence, every chancellor would be governed by his own estimate of the difficulties attending the administration, without any legal rule for his government. This court thinks there is no precedent which will warrant a court of equity to assume jurisdiction upon grounds loose and unsatisfactory as the foregoing; nor can such matters be drawn into controversy before the court. The remedy of the

complainant, by the ordinary rules of the common and statute laws of the country, is simple, and for anything this court can judicially know, unembarrassed. Had Smiley or the present complainant applied to the county court for administration upon the estate of Christopher Stump, it would, of course, have been granted to the applicant, or some other better entitled, who might have opposed it; when the suit in the circuit court could have been proceeded in, or if Bell's appeal had abated, the judgment in the county court could have been revived, and the debt collected; and when Smiley's administratrix could have availed herself of the account, and claimed her priority over other creditors to this particular fund. Than her right to do so, there is nothing better settled; nor is there anything standing in the way of this course of proceeding at this time. Strip this cause of the alleged facts, that Stump's estate is much embarrassed with outstanding debts against it, and the possibility that the administration thereof would be attended with much trouble, and it presents the ordinary case of a creditor of a deceased debtor, when no one next of kin will administer; in such case, can the creditor of the deceased proceed directly against a debtor of the deceased without administration upon the estate? That he can not, is most certain.

The court have given more attention to this point than they otherwise would have done, because it is the ground upon which the bill was filed and the decree below must have proceeded, but we think in mistake.

Decree reversed, without prejudice to the rights of the complainant.

See, generally, as to when courts of equity will entertain jurisdiction in matters of account, *Ludlow v. Simond*, 2 Am. Dec. 291, note 315.

MAISE v. GARNER.

[1 MARTIN & YERGER, 383.]

DEEDS, WHEN CANCELED FOR FRAUD.—Courts of equity will order a deed to be delivered to the grantor for the purpose of canceling a clause of general warranty contained therein, when it appears that subsequent to the execution and delivery of the deed to the grantee, the latter fraudulently inserted a general clause of warranty therein, notwithstanding the deed conveyed no title to the grantee.

BILL in equity. The bill stated that plaintiff had conveyed to defendant certain lands, by his deed dated September 16,

1815. That the deed contain a special clause of warranty, and that the defendant, after its delivery to him, and before offering it for registration, had altered it by additions and erasures, so as to make it a deed with a general clause of warranty. Defendant's answer denied making any alterations or erasures in the deed, and insisted the court had no jurisdiction. The land was described in the deed "to be on or near the Caney fork of Cumberland river, containing five thousand acres, more or less." The court, being of the opinion that the complainant, in law, had no title to the land, dismissed the bill.

Hunt, for complainant.

O. B. Hayes, *contra*.

By Court, CATRON, J. The circuit court dismissed the bill, "because it appeared from the complainant's own showing, that he had given no consideration for the bonds given to him by defendant, and made no offer to rescind the contract, but claims two of said bonds."

This court is first of opinion that where an obligation exists valid upon its face, but which, by extrinsic facts, is proven to be void, and of which a vexatious use may be made, to the prejudice of the apparent obligor, he has a right to apply to a court of equity to have such obligation delivered up, or canceled, notwithstanding a court of law has concurrent jurisdiction to declare it upon a trial at law brought thereon: 17 Ves. 111; 1 Ves. & B. 244; 1 Johns. Ch. 517; 7 Ves. 21, 414; 2 Atk. 308; 1 Madd. Ch. Pr. 185.

This court is furthermore of opinion that if the defendant did alter the deed from complainant to himself, after the same was originally executed, inserting therein a clause of general warranty, without the knowledge or assent of complainant, the clause thus fraudulently inserted is subject to be erased from said deed by the order of a court of equity, for the reason that a vexatious use may be made thereof to the prejudice of the complainant; and that the defendant may be compelled to surrender up said original deed to have so much thereof stricken out as has been fraudulently inserted after its execution.

This court is also of opinion that no reason existed sufficient to authorize the circuit court to dismiss the bill, growing out of the fact that no title was vested in defendant to the five-thousand-acre tract of land, assumed to have been conveyed by the deed alleged to have been altered. By such a course of decision the defendant would be permitted to take advantage of

his own wrong by the commission of a gross fraud (and perhaps forgery), which this court apprehends wholly inadmissible. It may be true that the deed vested no title in defendant, yet this did not authorize him fraudulently to insert covenants therein after its execution, which might at a future day be set up against the complainant or his representatives, when all evidence of the fraud was lost by time, and the destruction of the original deed.

The doctrine that a court of equity will relieve in such a case, is a most necessary one in this state, where all our conveyances of real estate are registered, copies evidence, and the originals may be destroyed immediately after registration, in which event it would be extremely difficult to prove the forgery, in most cases impossible, after a lapse of many years. If the party who purports to be affected by the deed, has no power to come into a court of equity to have it canceled, or delivered up, it will be wholly beyond his reach, until the grantee sees proper to sue thereon at law. This he may not choose to do, until all the witnesses who can prove the fact of fraud and forgery are dead. In this cause, the bill alleges the clause of warranty in the deed was forged by the defendant. This is directly denied by the answer, making an issue that this court is unwilling to try, therefore we will send it to law, where it may be tried by a jury.

The effect the answer is to have before the jury upon the trial of the issue, will be seen by reference to the following authorities: *Hunter v. Tinley and Wallis*, 1 Ten. 240; Act of 1782, ch. 11, sec. 3; 9 Cranch, 160; 1 Phil. Ev. 115, and note.

KEGLER v. MILES.

[1 MARTIN & YERGER, 426.]

STATUTE OF LIMITATIONS—ADVERSE POSSESSION of a slave for the statutory period, vests in the possessor an absolute right of property in the slave.

THE facts appear from the opinion.

By Court, CATRON, J. In this cause the facts are substantially these: Hartwell Miles, in 1815, was very dissipated, and had wasted most of his property, and was tending to insolvency. Wm. Boyd paid his debts, and took his plantation in payment; some negroes were left; of one of these (now in controversy) he made a bill of sale to his daughter Nancy, then about fourteen years old; no consideration was given, and it was made avowedly

in anticipation of future insolvency. In 1816 or 1817, Nancy married David Kegler, the plaintiff; the slave was taken into Kegler's possession by virtue of the bill of sale, and continued so until 1822, when Nancy, the wife, died, leaving two children; Kegler then resided in Mississippi. Kegler, soon after the death of his wife, returned to the house of his father-in-law, Hartwell Miles, in Davidson county, Tennessee, with the negro girl and his two children; he made a deed of gift of the girl to the children, which was duly acknowledged, and registered in Davidson county. The bill of sale made by Hartwell Miles to his daughter in 1815, was not registered until 1825, after the suit was brought. Soon after making the deed of gift, Kegler left Tennessee, leaving the negro girl and his children with Hartwell Miles. In 1823 Hartwell Miles took the negro to Rutherford county, and sold her to Peter N. Smith, and made a bill of sale for her, which was duly proven and recorded. Smith paid a full price, and believed he was acquiring a good title; he loaned the slave to his brother-in-law, Thomas Miles, who was sued in this action by Kegler's children. The jury found for the plaintiffs, upon complicated matters of law, and of fact, arising under the statute of frauds and registry acts. The court charged the jury. A new trial was moved for and refused, and the whole evidence set out.

That Nancy Miles, before her intermarriage with Kegler, acquired no valid title, as against a purchaser, from Hartwell Miles, is a perplexed question of law and fact; that Kegler acquired any title in consideration of the marriage depends upon facts doubtful in their character; there can be little doubt he claimed title by virtue of the bill of sale to his wife only. But one simple and undisputed fact exists in the cause, to wit: That Kegler took possession of the slave as his own, and held her as such, adversely to all others, for more than three years, before he conveyed to his children. That the act of limitations gave him a good title to defend himself, and barred the remedy of all others, is certain; but did it vest in Kegler an absolute title, which he could assert as plaintiff, is the question. It is contended that the remedy of Hartwell Miles was barred, but the right remained; consequently, if he got possession of the slave peaceably by recaption, the right and possession were again united, of which he, or those claiming under him, could not be deprived by Kegler, to whom the statute gave the power of resistance, as a defendant, vesting no right that could be

asserted as plaintiff; that the statute alone operated upon the remedy without touching the right.

Such are the reasonings upon the statute when applied to debtor and creditor in the English and American courts. That a claim barred by time is a good consideration for a new promise, is settled beyond controversy: *Clementson v. Williams*, 8 Cra. 72, 74; 3 Munf. 181, 197; *Bell v. Rolandson*, Hard. 301.

Does the same rule apply to the slave property of the slaveholding states? In the application of the statute to this description of property, the American courts, of necessity, must fix rules of their own; it is peculiar in its character, and English jurisprudence furnishes no precedents that can materially aid us.

The slave passes by deed, and is not regularly assets in the hands of the administrator; all the other goods must first be exhausted, and then the county court will order the sale of the slaves. Our laws and those of Virginia, equally in force in Kentucky, in these respects are the same in substance. Were the doctrines contended for by the counsel for the plaintiff in error the true ones, this consequence would follow: A. gets possession of B.'s female slave, say in Virginia, brings her here, sells her to an innocent purchaser, who keeps her ten or twenty years; she then has increase; the right of the mother is in the Virginia claimant; the increase follows of course the original right; before the child is three years old, the original claimant sues for and recovers it—did the woman have ten children, all would be recovered in the same manner. The use of the mother would be in one man, the right unbarred to the increase in another.

The next consequence is that A. holds a slave three years, and the remedy is barred as to him, but the statute communicates no right; he then sells to B., who cannot avail himself of the bar formed by the statute in favor of the first possessor, and the latter can be sued at any time within three years after his possession is acquired. Such is the doctrine declared by Judge Haywood in *Blanton v. Coulson*, 3 Hay. 155, 156¹. It is also declared that no property is acquired by three years' possession; the remedy by action is barred, but the right of recaption exists.

No such question was involved in that cause, and the suggestions made by Judge Haywood were used as an argument to prove that a want of knowledge in the plaintiff where his prop-

1. *Coulson v. Blanton*, 3 Hay. 155, 156.

erty was until within three years before action brought, would be a good replication to the statute of limitations. The cause was again brought before the supreme court of Sparta, in 1825, and was adjudged for the defendant, because the replication that plaintiff did not know where his property was, etc., was holden bad, and the suggestions reported in 3 Haywood were overruled. This decision was in accordance with that of *McGinnis* ads. *Jack and Cocke* [*ante*, 809], made at Knoxville in 1825. Nothing could be imagined much more dangerous to the repose of society than the recognition of the principle that, although the remedy was barred, the right of recaption existed, in cases of dormant claims to slaves. That this mode of asserting the claim would result in personal violence of the most dangerous character, is certain. No authority is found giving sanction to such an idea. The better opinion is, that when the right exists unbarred, and the true owner, by violence or by a tortious and unlawful act, obtains possession of the slave, he shall not be permitted to set up his better title when sued by him who was tortiously deprived of the possession. To do so would be to permit the defendant to take advantage of his own wrong: 3 Hen. & Mun. 61; 2 Ten. 98, 1 Hay. 13; act of 1779, c. 11; 1799, c. 28. Slaves having mind, the rule laid down in 3 Bl. Com. 4, must be most cautiously applied.

He who holds possession of land peaceably for seven years, by virtue of a grant or deed, acquires a right of soil, and if turned out of possession may regain it by the action of ejectment. Does the same rule hold in reference to slaves, when the remedy of the owner is barred by three years' adverse possession? So we hold, and that three years' possession of the slave in question, acquired without fraud or force, gave to David Kegler a legal title to her, and that the plaintiff ought to recover in this action. We feel it our duty, as also our inclination, to follow the decisions of sister states where slavery exists. Such has been the course of decision in Virginia: *Newby v. Blakey*, 3 Hen. & Mun. 56, 66. In the supreme court of the United States, *Brent v. Chapman*, 5 Cranch, 358, followed in *Guy v. Shelby*, 11 Wheat. 571,¹ and of Kentucky in *Thompson v. Caldwell*, 3 Littell, 136.

The judgment of the circuit court must, therefore, be affirmed.

ADVERSE POSSESSION for the period required by law vests an uncontrovertible title to the property in the person holding the same adversely: *Camp v. Camp*, 13 Am. Dec. 60; *Riley v. Jameson*, 14 Id. 325; Id. 764.

1. *Guy v. Shelby*, 11 Wheat. 371.

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See EQUITY, 13; PLEADING AND PRACTICE, 14, 15.

ACKNOWLEDGMENTS.

1. BY A WIFE to a deed in the form prescribed by statute, passes her interest as effectually as a fine. *Chase's case*, 277.
2. WIFE'S ACKNOWLEDGMENT OF A LEASE for years made by her husband is valid only to the extent of the lease, and she is entitled, immediately upon his death, to dower in the reversion and in the rent reserved, without delay of execution during the term. *Id.*

ACTIONS.

1. HE WHO ERECTS GRAVESTONES to the memory of another may maintain an action for an injury done to them during his life-time. But after the decease of the one who reared them, the action for an injury thereto must be brought by the heirs of him to whose memory they were erected. *Sabin v. Harkniss*, 437.
2. PROPERTY PAID OR RECEIVED AS MONEY will support an action for money had and received, or money paid. *Ainslie v. Willson*, 532.

See CORPORATIONS, 6.

ADVERSE POSSESSION.

1. TITLE ACQUIRED BY.—An adverse possession for the period required by law, confers a title on which a party may maintain ejectment. *Crockett v. Lashbrook*, 98.
2. CAN NOT BE SET UP BY A TENANT for life against the remainderman or reversioner. *Jackson v. Harsen*, 517.
3. AFTER THE TERMINATION OF THE LIFE-ESTATE, if the reversioner permit the representatives of the tenant for life to hold, claiming as their own for the time prescribed by statute, the right of recovery is gone. *Id.*
4. STATUTE OF LIMITATIONS, of a slave for the statutory period, vests in the possessor an absolute right of property in the slave. *Kegler v. Miles*, 819.

AFFIDAVITS.

See ORDERS, 2; PLEADING AND PRACTICE, 10, 11, 12, 13.

AGENCY.

1. THE DEED OF AN ATTORNEY IN FACT, authorized by parol to convey, will not pass the legal title, but the same may be sufficient to raise an equity. *Jackson v. Murray*, 53.

2. **AGENT—AUTHORITY NEED NOT BE IN WRITING.**—To make a contract valid under the statute of frauds, it is not necessary that the agent's authority be in writing. If the signature of the principal be affixed by a person authorized by parol, this is sufficient. *Id.*
3. **AN AGENT OF THE GOVERNMENT**, appointed to superintend the execution of a contract with the United States, but not to make a contract with any one, is not personally liable for demanding, through a misconstruction of its terms, more than the contract calls for. *Webster v. Drinkwater*, 238.
4. **AGENT MUST CONTRACT IN THE PRINCIPAL'S NAME**, or the latter will not be bound. *Stone v. Wood*, 529.
5. **AGENT MUST SHOW HIS PRINCIPAL LIABLE** upon a contract made by him, or he will be himself liable thereon. *Id.*
6. **AGENT SIGNING AND SEALING A CONTRACT** in his own name is personally liable thereon, although he describe himself as agent. *Id.*
7. **ONE DESCRIBING HIMSELF AS AGENT**, but who covenants as in his own right, may maintain an action against the covenantee who enters and enjoys the premises. *Potts v. Rider*, 581.

See **EXECUTORS AND ADMINISTRATORS**, 4, 6, 7, 15, 16.

ASSIGNMENT.

See **CONFLICT OF LAWS**, 3, 4, 5, 6, 7, 8.

ASSUMPSIT.

See **ACTIONS**, 2; **CO-TENANCY**, 5; **VENDOR AND VENDER**, 5.

ATTACHMENT.

1. **BANK BILLS MAY BE ATTACHED** and sold under execution. *Spencer v. Blaisdell*, 412.
2. **LEGACIES MAY BE ATTACHED IN THE HANDS OF THE DEVISEE**, for the legatee's debt, if they are charged upon real estate; but mere personal legacies can not be attached. *Woodward v. Woodward*, 462.

ATTORNEY AND CLIENT.

See **EVIDENCE**, 8, 9; **SHERIFFS**, 3.

BANKRUPTCY AND INSOLVENCY.

See **CONFLICT OF LAWS**, 3, 4, 5, 6, 7, 8; **CONTRACTS**, 10.

BONA FIDE PURCHASERS.

1. **TO CONSTITUTE A PERSON A PURCHASER FOR A VALUABLE CONSIDERATION**, without notice, it is necessary that he should have paid the money and obtained a conveyance before notice. *Blight's Heirs v. Banks*, 136.
2. **BONA FIDE PURCHASER.**—Where, in answer to a bill to set aside a deed as fraudulent, the grantee alleges that he was a *bona fide* purchaser, without notice of the plaintiff's claim, he must aver and prove not only that he made the purchase, but that he actually paid the purchase-money before receiving notice of said claim. *Jackson v. McChesney*, 521.
3. **IF THE MONEY WAS SECURED TO BE PAID**, but not actually paid before notice, the defense will not be made out. *Id.*

4. **THE RULE IN EJECTMENT IS DIFFERENT**, because there the strict legal title must prevail. *Id.*
5. **WHERE A MORTGAGE IS UNREGISTERED**, a *bona fide* purchaser from the mortgagor takes the land free of the incumbrance; so, also, his grantees who purchase after registration of the mortgage. *Id.*
6. **PURCHASER FOR VALUE**, without notice of an equitable lien, holds the property discharged of the lien. *White v. Dougherty*, 802.

See NOTICE, 1.

BONDS.

FILLED UP AFTER SIGNING—WHEN VALID.—Where two persons signed and sealed a blank piece of paper, and left it with the judge of the court to be filled up, conditioned to take the benefit of the insolvent act, which was done; held, that the bond was valid and binding. *Wiley v. Moor*, 696.

CHAMPERTY, MAINTENANCE, AND BARRATRY.

1. **CHAMPERTOUS CONTRACTS—WHAT ARE.**—Contracts to aid in defense of a suit, in consideration of money and a part of the land in the event of success, are champertous and void. *Brown v. Beauchamp*, 81.
2. **CHAMPERTY** is a misdemeanor, and punishable by fine and imprisonment. *Id.*

COMMON CARRIERS.

FOR TRANSPORTING GOODS TO AN INTERMEDIATE POINT, the carrier can not recover freightage, unless the goods were actually delivered and actually received. *Harris v. Rand*, 421.

COMPENSATION.

See TRUSTS AND TRUSTEES, 15, 17, 18, 19, 20.

COMPROMISE.

1. **COMPROMISE OF A DOUBTFUL CLAIM** will not be set aside, except for fraudulent misrepresentation or concealment of facts, or for such imposition as amounts to unfair and unconscientious dealing. *Mills v. Lee*, 118.
2. **CONCEALMENT OF FACTS** which a party is not bound to disclose is not ground for avoiding a compromise; and one party to a controversy concerning land is not bound to disclose to his adversary defects in his own title. *Id.*
3. **THE EXISTENCE OF CONFLICTING PATENTS**, located on the same land, and held by opposite parties to a compromise, constitutes a good foundation and consideration for such compromise. *Id.*

See EVIDENCE, 2.

CONCEALMENT.

See COMPROMISE, 1, 2.

CONFLICT OF LAWS.

1. **LAWS DETERMINING AGE OF MAJORITY.**—The laws of the domicile of origin govern the state and condition of a minor, into whatever country he removes. *Barrera v. Alpuente*, 179.

2. AN EXECUTOR UNDER THE LAWS OF ONE STATE can not indorse a note payable to the testator by a citizen of another state, so as to give the indorsee a right of action in his own name in the latter state. And this objection may be taken under the general issue. *Stearns v. Burnham*, 228.
3. A FOREIGN ASSIGNMENT IN BANKRUPTCY does not operate as a legal transfer of the bankrupt's property in this state, as against a creditor here of the bankrupt. And the attachment under a trustee process of goods here belonging to the bankrupt, before notice of the assignment, is valid against the assignment. *Blake v. Williams*, 372.
4. FOREIGN COMMISSION OF BANKRUPTCY gives the assignees no lien against a subsequent attachment by creditors here. *Robinson v. Crowder*, 762.
5. ASSIGNMENT UNDER A FOREIGN BANKRUPT LAW transfers the bankrupt's property, wherever situated, as between him and his assignees. *Id.*
6. CREDITORS HERE ARE NOT BOUND BY AN ASSIGNMENT in England in aid of the bankrupt law, for such an assignment can not have an effect beyond or inconsistent with the law itself. *Id.*
7. BANKRUPT'S ASSIGNEES stand in the same situation as the bankrupt, with respect to foreign creditors, and take subject to the same rights and remedies. *Id.*
8. ASSIGNMENT IN ENGLAND NOT IN AID OF THE LAW, made within two months of the bankruptcy, is void. *Id.*

CONSIDERATION.

- A CONSIDERATION EXPRESSED IN A DEED can not be contradicted for the purpose of defeating the conveyance, except in cases of fraud. *Mores v. Shattuck*, 419.

See DEEDS, 7, 8, 9, 10; TRUSTS AND TRUSTEES, 22.

CONSPIRACY.

See CRIMINAL LAW, 16, 17.

CONSTITUTIONAL LAW.

1. THE RIGHT OF AN INDIVIDUAL TO A PENALTY incurred under a statute is a civil cause within the meaning of the constitution, and can not be taken away by a repeal of the statute. *Dow v. Norris*, 400.
2. RETROSPECTIVE LAWS—WHEN VALID.—An act of the legislature that removes an impediment and allows a contract to be enforced, although retrospective, is not unconstitutional; so held as to an act allowing a corporation to maintain a suit on a note, although the corporation was at the time of taking the note dissolved by failure to pay a certain per cent. of its dividends to the commonwealth, and in consequence thereof all notes taken by it at that time were null and void. *Bleakney v. Farmers etc. Bank*, 635.
3. POWER OF LEGISLATURE AS TO RETROSPECTIVE ACTS.—The legislature can not in general establish a rule to operate retrospectively; but when the rule is unsettled, it belongs to the legislature to settle it, and such a rule necessarily operates both prospectively and retrospectively. *Peyton v. Smith*, 758.
4. RETROSPECTIVE STATUTE, WHAT IS NOT.—A statute enacting that no words of limitation shall "hereafter" be necessary to devise a fee is not retrospective but declaratory. *Id.*

CONTRACTS.

1. CORRECTION OF MISTAKES IN, BY PAROL.—Parol evidence is admissible to correct a mistake in a written contract, when such mistake is caused by the artifice of one of the parties; and a contract so corrected may be specifically enforced. *McCurdy v. Breathitt*, 65.
2. FAILURE TO COMPLY WITH TERMS of a special covenant destroys the right to recover under the contract. *Morford v. Mastin*, 168.
3. WAIVER OF OBJECTION TO QUALITY OF WORK DONE.—Where the contract is for work to be done on movable articles, acceptance is a waiver of objection to the quality of the work; but where the article made immediately becomes a part of the realty, the use of it does not amount to an acceptance. *Id.*
4. PLAINTIFF CAN NOT RECOVER A QUANTUM MERUIT in an action of covenant, after having failed to prove the performance of a condition precedent. *Id.*
5. DEMAND IS NOT NECESSARY where the person owing the debt or duty has means of knowing when it becomes due as well as the opposite party. *Id.*
6. AN INDORSEMENT UPON AN INSTRUMENT before its execution may be parcel of the obligation, but to have this effect it must be shown affirmatively to have been upon the instrument when executed. *Emerson v. Murray*, 407.
7. WHERE PARTIES ARE IN PARI DELICTO, with reference to an illegal contract, neither can maintain an action which requires, for its support, the aid of such illegal contract. *Roby v. West*, 423.
8. PROMISES OF SUBSCRIBERS to contribute specified sums for the erection of a public building are binding, and where the building has been erected, an action may be sustained against one to recover what he subscribed. *George v. Harris*, 446.
9. PAROL evidence is inadmissible to vary the terms of such a promise. *Id.*
10. NOTE GIVEN BY INSOLVENT DEBTOR to two of his creditors, in consideration of their withdrawing opposition to his discharge, is void. *Sharp v. Teese*, 479.
11. ATTEMPT TO CONTRAVENE THE POLICY OF A PUBLIC STATUTE is illegal, whether expressly prohibited by such statute or not. *Id.*
12. AFFIXING A SEAL, WHEN UNNECESSARY to the validity of a contract, will not vitiate it. *Robinson v. Crowder*, 762.

See AGENCY; CHAMPERTY, 1; EQUITY, 1; INFANCY; MASTER AND SERVANT; MENTAL UNSOUNDNESS, 3, 4, 11, 12.

CORPORATIONS.

1. CORPORATION IS BOUND BY AGREEMENT made by the incorporators before organization, and afterwards ratified by its agents. *Frankfort S. T. Co. v. Churchill*, 159.
2. COURT OF EQUITY WILL ENJOIN A JUDGMENT AT LAW obtained by a corporation for installments due on subscription for capital stock by an agreement which the corporation had violated; and compel it to restore what has been paid under such agreement. *Id.*
3. IT IS A SUFFICIENT CONSIDERATION for a promissory note that it was given to the trustees of a charitable institution. after a subscription for

charitable purposes, payable to such trustees, the note reading for value received, and expressly referring to the subscription whose purposes were in process of execution. *Amherst Academy v. Cowls*, 387.

4. **POWERS OF CORPORATION.**—Trustees of an academy incorporated “to promote morality, piety and religion, and for the instruction of youth in the learned languages, and in such arts and sciences as are usually taught in other academies,” may procure subscriptions and take promissory notes to constitute a fund for the purpose of founding an institution “for the classical or academical and collegiate education of indigent young men, with the sole view to the Christian ministry,” to be incorporated with the academy. *Id.*
5. **AN ASSIGNMENT OF THE NOTES** by the trustees to a distinct college having power to receive the fund is a valid transfer of the notes. *Id.*
6. **THE TRUSTEES OF THE ACADEMY** were the proper parties in whose name to bring the action on the notes, they not having been indorsed. *Id.*
7. **MAJORITY OF THE DIRECTORS OF A CORPORATION** must be present at any meeting to constitute a board competent to transact business, unless the charter gives that power to a less number. *Ex parte Willcocks*, 525.
8. **TO MAKE A QUORUM** of a select and definite body of persons possessing a power to elect, the general rule is that a majority, at least, must be present, and then a majority of the quorum may decide. *Id.*
9. **TWO OF A BOARD OF NINE DIRECTORS** of a corporation have not the power to hold a meeting, and to appoint inspectors of an election of directors. *Id.*
10. **DISTINCTION EXISTS BETWEEN A CORPORATE ACT** to be done by a select body, and an act to be done by the constituent members; in the latter case a majority of those who appear may act. *Id.*
11. **HYPOTHECATION OF STOCK.**—A by-law providing that a percentage of the stock of a member indebted to the corporation shall be deemed hypothecated, and held as security for the debt, does not constitute a hypothecation. *Id.*
12. **HYPOTHECATION IS CONVENTIONAL**, and implies a power of selling the property to satisfy the debt on default of payment. *Id.*
13. **WHERE STOCK STANDS IN ONE’S NAME** on the transfer-books, it is conclusive upon the inspectors as to his right to vote at an election of directors. *Id.*
14. **OWNER OF HYPOTHECATED STOCK** may vote thereon. *Id.*
15. **INSPECTORS MAY BE CANDIDATES** for directors at the election held by them. *Id.*

See MUNICIPAL CORPORATIONS.

COSTS.

PAYMENT OF COSTS.—Parties defendant in a suit to quiet title to lands, who contest the plaintiff’s right, will be compelled to pay the costs of the contest by them unnecessarily enlarged and increased. *Blight’s Heirs v. Banks*, 136.

CO-TENANCY.

1. **PATENT FOR LANDS ISSUED TO TWO PERSONS AS JOINT TENANTS** after the death of one of them, passes the title to the whole estate to the surviving grantee. *Overton v. Lacy*, 111.

2. TITLE OF ONE OF TWO JOINT TENANTS acquired before the *jus accrescendi* was abolished, is good as against the representatives of the other. *Id.*
3. PAROL AGREEMENT BETWEEN JOINT TENANTS TO SEVER JOINT ESTATE, if made before the passage of the statute against frauds and perjuries, will be enforced in a court of equity. *Id.*
4. JOINT OWNERS OF PROPERTY MUST BEAR THEIR RATABLE PROPORTION of the expenses incurred by one of their number, as manager, in making useful improvements on it, when no objections were made by them to the making of the expenditures. *Percy v. Millaudon*, 196.
5. ONE TENANT IN COMMON OF PERSONALTY may sue in assumpsit his cotenant who has sold the common property and received all the money. *Gardiner Mfg. Co. v. Heald*, 248.

COVENANTS.

1. THE COVENANT OF SEISIN RUNS WITH THE LAND when the covenantor was in possession at the time of the conveyance, claiming title. *Bactus v. McCoy*, 585.
2. THE COVENANT OF SEISIN DOES NOT PASS with the land where the grantor was not seised, either in deed or in law, at the time of conveyance. In such case the covenant is broken immediately. *Id.*
3. SEISIN IN FACT, with claim of title, will sustain the covenant so long as the grantees have such seisin, although the covenantor was a disseisor. *Id.*
4. COVENANT TO STAND SEISED must be supported by a good or valuable consideration, and the mere insertion of the words "having received full value" will not support such a covenant. *Singleton v. Bremar*, 699.
5. RECOVERY ON A BREACH OF SUCH COVENANT must be measured by the consideration paid. *Id.*
6. WARRANTY OF TITLE.—To maintain an action of covenant upon a warranty of title, it must appear that the warrantee has been evicted, by elder and better title, prior to the commencement of the action. *Ferries v. Harshea*, 782.
7. EVICTION, WHAT IS.—A judgment in ejectment, against a warrantee, without an actual ouster by a writ of possession, or a yielding up of possession by the warrantee, is not a sufficient eviction to enable the latter to maintain an action upon the warranty of title; there must be an actual dispossession. *Id.*

See DAMAGES; DEEDS, 3.

CRIMINAL LAW.

1. INDICTMENT FOR FORGERY setting forth the counterfeit note according to its tenor need not aver the loss or destruction of such note, and upon proof of its mutilation or destruction by the defendant, other proof of its contents may be admitted in evidence. *State v. Potts*, 450.
2. A FULL DESCRIPTION OF THE FORGED INSTRUMENT must be set forth in the indictment, or the omission to do so excused by proper averments. *Id.*
3. A DIFFERENCE, OR EVEN A CONTRADICTION, in the testimony of witnesses for the prosecution, does not defeat an indictment. *Id.*
4. WHETHER OR NOT THERE IS A VARIANCE between the note set forth in the indictment and that produced on the trial is a question of fact for the jury, and their verdict is conclusive. *Id.*

5. **AMENDMENT OF CAPTION TO INDICTMENT.**—The caption to an indictment may be amended in the supreme court, after its removal thereto by certiorari, upon proof of the necessary facts; or it may be sent back to the lower court, there to be amended from the record. *State v. Jones*, 483.
6. **ALLEGATION OF THE PROSECUTING ATTORNEY** that the record of the lower court contains sufficient materials from which to amend the caption to an indictment, warrants the supreme court in sending it to such court for amendment. *Id.*
7. **CAPTION TO INDICTMENT** need not show that the members of the grand jury were summoned and returned as such. *Id.*
8. **OFFENSE COMMITTED IN A COUNTY** before its division is indictable in the new county embracing that portion of the old one in which such offense was committed. *Id.*
9. **IN INDICTMENT FOR FORGERY** it is not necessary to allege that the person whose name was forged was actually defrauded thereby; it is sufficient to show that he might have been defrauded had the forgery succeeded. *Id.*
10. **INDICTMENT FOR STEALING "A PARCEL OF OATS"** is sufficiently certain. *State v. Brown*, 562.
11. **INDICTMENT MUST STATE THE TIME** when an offense was committed, but the proof need not be confined to that time; it is only necessary to show that the offense was committed prior to the finding of the indictment. *State v. Orrell*, 563.
12. **IF DEATH DO NOT ENSUE WITHIN A YEAR AND A DAY** after a wound is given, the law will presume the wound did not cause the death. *Id.*
13. **INDICTMENT FOR MURDER** must show that death ensued within a year and a day after the wound, or it will be fatally defective. *Id.*
14. **INDICTMENT MUST SHOW THAT DEATH OCCURRED IN THE COUNTY** or it will be defective. *Per Taylor, C. J.* *Id.*
15. **EVERY CONSPIRACY TO INJURE INDIVIDUALS**, or to do acts which are unlawful or prejudicial to the community, is indictable at common law. *State v. Younger*, 571.
16. **CONSPIRACY TO DO THE ACT** constitutes the offense, though no act be performed. *Id.*
17. **COMBINATION BY TWO TO CHEAT** another by making him drunk and defrauding him at cards, is an indictable conspiracy. *Id.*
18. **INDICTMENT FOR PERJURY** charging generally that the false oath was material to the trial of the issue upon which it was taken, without showing particularly how it was material, is sufficient. *State v. Mumford*, 573.
19. **GENERAL AVERMENT OF THE FALSITY** of the testimony is insufficient; each fact falsely sworn to must be distinctly negatived. *Id.*
20. **INDICTMENT FOR STEALING GOODS** of three persons named is not supported by proof of stealing goods of each of them in which they had no joint interest. *State v. Ryan*, 702.
21. **FELONY—A CONVICTION, JUDGMENT, AND EXECUTION**, upon one indictment for a felony, not capital, is a bar to all other indictments for felonies, not capital, committed previous to such conviction. *Crenshaw v. State*, 788.
22. **INDICTMENT** that states the grand jurors to be "good and lawful men" is sufficient, without alleging they are freeholders or householders. *Bonds v. State*, 795.

23. **INSANITY, HOW DETERMINED.**—If a prisoner convicted of murder alleges, as a reason why sentence of death should not be pronounced, that at that time he was insane, the judge may himself determine the truth or falsity of the plea, or he may submit the same to a jury. *Id.*

See **CHAMPERTY**, 2.

DAMAGES.

1. **TO ASCERTAIN THE DAMAGES** for the breach of the covenant of seisin in a deed, the true consideration may be shown by parol, notwithstanding a different consideration is expressed in the deed. *Morse v. Shattuck*, 419.
2. **FOR THE BREACH** of the covenant of seisin is the consideration paid and interest. *Backus v. McCoy*, 585.

See **COVENANTS**, 5.

DEEDS.

1. **EXECUTED ABROAD** may, under the statutes of this state, be registered here within eighteen months. *Blight's Heirs v. Banks*, 136.
2. **DEFECTIVE REGISTRY OF DEED.**—Where a certified copy of a deed, and not the original, is recorded, the registry is defective; but a court of equity has power to remedy such defect. *Id.*
3. **THE WORD "GIVE"** in a deed of bargain and sale does not, in Maine, import a covenant of warranty. *Allen v. Sayward*, 221.
4. **THE CANCELING OF A DEED** does not revest property which has once passed by transmutation of possession. *Farrar v. Farrar*, 410.
5. **IDEM.**—But where the grantee voluntarily, and without any misapprehension or mistake, consented to the destruction of the deed, with a view to revest the title, neither he, nor any other person claiming by title subsequently derived from him, is to be permitted to show the contents of the deed so destroyed. *Id.*
6. **AN AGREEMENT TO CANCEL A DEED**, without actually canceling, is without effect. *Id.*
7. **THE RECEIPT OF THE CONSIDERATION** expressed in a deed may be contradicted like any other receipt; but not for the purpose of defeating the conveyance. *Pritchard v. Brown*, 431.
8. **LAND WILL PASS BY WAY OF BARGAIN AND SALE**, where a consideration of money is expressed in the deed, although defectively executed under the state statute. *Id.*
9. **ACKNOWLEDGMENT IN A DEED** of the receipt of the consideration is *prima facie* evidence of its payment, although it may be rebutted. *Jackson v. McChesney*, 521.
10. **SUCH ACKNOWLEDGMENT** does not operate as an estoppel, but as evidence merely, tending to uphold the deed. *Id.*
11. **FEE TAKING EFFECT IN FUTURO** can not be created by deed; and a deed to take effect at the grantor's death is void. *Singleton v. Bremar*, 699.
12. **THIS RULE IS NOT ABROGATED** by substituting delivery of the deed for livery of seisin. *Id.*
13. **BLANK SIGNED, SEALED, AND DELIVERED** and afterwards filled up is no deed. *Duncan v. Hodges*, 734.
14. **DEED MADE OUT IN BLANK** and afterwards filled up and delivered by the grantor's agent is valid. *Id.*

15. **PERSONAL DELIVERY IS UNNECESSARY**; it may be made by another, by the grantor's appointment or authority precedent, or by his subsequent assent or agreement. *Id.*
 16. **DEED INFORMALLY EXECUTED AND DELIVERED** will be made good by the grantor subsequently accepting and claiming the benefit of the contract growing out of it. *Id.*
 17. **DEEDS, WHEN CANCELED FOR FRAUD.**—Courts of equity will order a deed to be delivered to the grantor for the purpose of canceling a clause of general warranty contained therein, when it appears that subsequent to the execution and delivery of the deed to the grantee, the latter fraudulently inserted a general clause of warranty therein, notwithstanding the deed conveyed no title to the grantee. *Maiss v. Garner*, 817.
- See **ACKNOWLEDGMENTS**; **AGENCY**, 1; **CONSIDERATION**; **MENTAL UNSOUNDNESS**, 12; **SHERIFFS**, 4, 6, 7.

DELIRIUM.

See **MENTAL UNSOUNDNESS**, 7.

DELIVERY.

See **DEEDS**, 13, 14, 15, 16.

DOTAGE.

See **MENTAL UNSOUNDNESS**, 1, 2, 9, 12.

DOWER.

1. **WIDOW IS ENTITLED TO DOWER IN AN EQUITABLE ESTATE** of her husband, capable of being specifically enforced in his life-time. *Graham v. Graham*, 166.
2. **RENTS OF THE MANSION OF THE DECEASED HUSBAND** must be assigned to the widow until her dower is assigned. *Id.*
3. **DEVISE IN LIEU OF DOWER—ELECTION.**—In case of a devise to a widow in lieu of dower she has an election either to accept the devise or claim dower. *Hall's case*, 275.
4. **ELECTION ONCE MADE AND AFFIRMED** by bringing suit, will not be annulled on the ground of mistake, except upon strong and clear proof. *Id.*
5. **DEVISE, WHEN VOID AS TO CREDITORS.**—A devise in the nature of a mere gift, or appointing persons to take in lieu of the heirs, is void as to creditors. *Id.*
6. **DEVISE IN LIEU OF DOWER NOT VOID AGAINST CREDITORS.**—A devise in lieu of dower, if accepted, discharges a highly favored debt, and the widow is, therefore, deemed a purchaser for a fair consideration, whose claim, to the extent of the value of her dower, is valid against creditors. *Id.*
7. **EXCESS OF DEVISE OVER THE VALUE OF THE DOWER** is void as to creditors. *Id.*
8. **DOWER IN RENT.**—A widow may be endowed of rent. *Chase's case*, 277.
9. **DOWER IN CASE OF LEASE BEFORE MARRIAGE.**—Where one makes a lease for years, reserving rent before his marriage, his widow is entitled to dower in the reversion and in the rent immediately from her husband's death. *Id.*

10. **FEME-COVERT OF FULL AGE** may convey her land or relinquish her dower by a fine, but conveyance by fine has long been disused in Maryland. *Id.*
11. **DAMAGES OR MESNE PROFITS FOR DETENTION OF DOWER** can be recovered at law only from the time of demand upon the heir. *Id.*
12. **ACCOUNT OF RENTS AND PROFITS ON ASSIGNING DOWER** will be allowed, in equity, from the husband's death, but without costs if the claim is not opposed by the heir. *Id.*
13. **SEQUESTRATION OF HEIR'S INTEREST** is not allowable to pay rents and profits awarded to the widow. *Id.*
14. **DOWER IN PROPERTY NOT DIVISIBLE** may be assigned in the form of a rent distrainable of common right. *Id.*
15. **DOWER** is not within the statute of limitations. *Barnard v. Edwards*, 403.
16. **DEMAND OF DOWER** before action for it is unnecessary. *Jackson v. Churchill*, 514.
17. **DEVISE IN LIEU OF DOWER**, if accepted, bars dower. *Id.*
18. **TESTAMENTARY PROVISION DOES NOT BAR DOWER**, if accepted, unless expressly given in lieu of dower, or unless the claim of dower is plainly inconsistent with the testator's intention. *Id.*
19. **DEVISE OF A DWELLING-HOUSE TO THE WIDOW** of the testator, during life or widowhood, together with a bequest of certain household furniture and other property, the rest of the real and personal estate being divided among the testator's children, who were to aid in the widow's support, if she should request it, does not, if accepted, bar the claim to dower. *Id.*
20. **THERE IS NO DOWER** in lands given for public uses. *Gwynne v. Cincinnati*, 576.

See ACKNOWLEDGMENTS, 2.

EASEMENTS AND SERVITUDES.

1. **RIGHT OF WAY, APPURTENANT.**—Where the owner of three tracts of land, over one of which he has been accustomed to pass by a way between the other two, conveys these two, with their appurtenances, the way does not pass. *Barker v. Clark*, 428.
2. **A HIGHWAY MAY BE ESTABLISHED** by long usage; but a way, to become public, must be used in such a manner as to show that the public accommodation requires it to be a highway, and that it is the intention of the owner of the land to dedicate the way to the public. *Id.*
3. **TO REBUT THE PRESUMPTION OF THE GRANT OF A WAY** from an alleged uninterrupted use, evidence that the owner of the land had plowed up the way, within the statutory time, at the same time declaring that the claimant had no right of way, is admissible. *Id.*
4. **PRIVILEGE CLAIMED IN DEROGATION OF ANOTHER'S RIGHTS** is viewed with jealousy by the law, and must be strictly confined within prescribed limits. *Taylor v. Hampton*, 710.
5. **LIMITS OF PRIVILEGE OF MAINTAINING A POND** appurtenant to a mill, overflowing another's land, by a purchaser of such mill, are the height at which the water was kept at the time of the purchase, and the object to which it was then applied. *Id.*
6. **EXTINGUISHMENT OF AN INCORPOREAL HEREDITAMENT**, for a moment, is

its complete destruction, so that it is gone forever; and is not its mere suspension. *Id.*

7. SUCH RIGHTS ARE DENOMINATED SERVITUDES in the civil law. *Id.*
8. EXTINGUISHMENT MAY BE EITHER BY THE ACT OF GOD, operation of law, or the act of the party. *Id.*
9. ACT OF THE PARTY WILL EXTINGUISH A RIGHT where the act of God or of the law will only cause its suspension. *Id.*
10. EXPRESS OR IMPLIED RENUNCIATION will extinguish a servitude. *Id.*
11. OBSTRUCTION OF A SERVITUDE by another's act only suspends it. *Id.*
12. RIGHT MAY BE DESTROYED either by an act of the party positively destructive of it, or by an act incompatible with the nature or exercise of it. *Id.*
13. PERMANENT OBSTRUCTION of a servitude by the party himself destroys it, and it can not be revived except by a new grant; it is otherwise as to a temporary obstruction. *Id.*
14. RIGHT TO MAINTAIN A MILL POND overflowing another's land, for the purpose of supplying a mill, will be extinguished by the act of a purchaser, who himself erects another mill on a different spot, and diverts the water thereto, so that the old mill can not be used as it formerly was, while the new one is in operation; and such right will not be revived by the destruction of the new mill, and the restoration of the water to the former channel. *Id.*

EJECTMENT.

See BONA FIDE PURCHASERS, 4.

ELECTION.

See DOWER, 3, 4, 6, 17, 18; JUDGMENTS, 4.

EMBEZZLEMENT.

See INFANCY, 9.

EQUITY.

1. WHEN EQUITY WILL RESCIND.—Equity will not rescind a conveyance where a purchaser buys with full knowledge of all the facts, and there has been no fraud. *Breckenridge v. Waters*, 46.
2. DOUBTFUL TITLE, acceptance of, not decreed. *Jackson v. Murray*, 53.
3. A COURT OF EQUITY will never compel a vendee to take a title not free from controversy. *Id.*
4. EQUITY JURISDICTION.—A court of equity has jurisdiction to compel original grantors to execute deeds of confirmation, where the parties through whom the complainant claims title, have lost or failed to register their deeds; and it will interfere to remove difficulties in land titles when a party can not readily proceed at law, when the conveyances are lost or in the hands of the opposite party, or when the parties are numerous and the proof hard of access; and generally to remove incumbrances and claims calculated to disturb the possession of the complainant and to lessen the value of his estate. *Blight's Heirs v. Banks*, 136.
5. EJECTMENT BILLS.—The court will, on ejectment bill being brought in such cases, clear a title purely legal, and also decree possession. *Id.*

6. IT IS NO DEFENSE IN A SUIT TO OBTAIN DEED OF CONFIRMATION, that the defendant was not paid the purchase-money, where it appears that complainant claims under defendant's grantee for valuable consideration, without notice. *Id.*
7. AN UNPERFORMED AGREEMENT which remains a cloud on title to land will be rescinded, and a release thereof decreed. *Id.*
8. WHERE A TESTATOR IS INDUCED TO OMIT A BEQUEST or devise, which he had expressed an intention of inserting in his will in favor of a particular person by the promise of another to give such person the same amount of property, or to provide for him in some other manner, such promise may be enforced in equity at the suit of the person for whose benefit it was made. *Owings' Case*, 311.
9. MERE EXPRESSIONS OF BENEVOLENT INTENTIONS, founded upon no consideration, are not enforceable in equity. *Id.*
10. AFFIRMATIVE RELIEF TO A DEFENDANT, not responsive to the prayer of the plaintiff's bill, may be decreed where the equities of the whole case disclosed by the pleadings and proofs require it. *Id.*
11. COMPENSATION FOR IMPROVEMENTS and taxes in and about lands made by one who entered under color of title, and is ejected at law, can not be recovered in equity from the real owner. *Winthrop v. Huntington*, 601.
12. COURTS OF EQUITY, JURISDICTION OF, in matters of accounts, depends upon whether the same are mutual and complicated; if not, jurisdiction will not be entertained. *Smiley v. Bell*, 813.
13. ACTIONS ABATED BY DEATH—WHEN REVIVED BY A BILL IN EQUITY.—Where, during the pendency of an action, in the name of an assignor of a claim for the benefit of an assignee, the former dies, a bill in equity will not be entertained by the assignee to revive the action, on the ground that no person would administer upon the assignor's estate, in consequence of its embarrassed and insolvent condition. *Id.*

See JUDGMENTS, 5; STATUTE OF LIMITATIONS, 8.

ESTATES OF DECEASED PERSONS.

1. RENTS MUST BE PAID ON IMPROVED LANDS OF THE TESTATOR by one of several heirs who has had the sole use thereof, the value of improvements made by him to be deducted from such rents; but in no case should a balance for improving be charged against the co-heirs. *Graham v. Graham*, 166.
2. CREDITOR'S INTEREST IN DECEDENT'S ESTATE, or that of the personal representative, is not of such a nature as to preclude the legislature from repealing the laws authorizing sales of the estate for the payment of debts. *Ludlow v. Johnson*, 609.

ESTOPPEL.

1. TITLE ACQUIRED SUBSEQUENT TO CONVEYANCE INURES TO WHOM.—Land acquired by a grantor subsequent to his conveyance of the same to different grantees inures to the benefit of the first grantee, and is not liable for the debts of the grantor. *Morrison v. Caldwell*, 84.
2. TRUSTEE, WHEN ESTOPPED FROM ASSERTING AN OUTSTANDING TITLE.—A trustee can not acquire for his own benefit an outstanding title to the

- trust property, and a conveyance with warranty against his grantor, will estop the trustee from asserting a claim to the trust property acquired at an execution sale against his grantor. *Id.*
3. **ESTOPPEL.**—A person ignorant of his claim to property, is not estopped from subsequently asserting it, although he stands by and sees the property sold as that of another. *Id.*
 4. **ESTOPPEL BY DEED.**—Covenants of lawful seisin in fee and good right to convey do not estop the grantor from setting up an after acquired title against the grantee. *Allen v. Sayward*, 221.
 5. **ASSIGNEE BOUND BY ESTOPPEL.**—Where the tenant in a writ of entry disclaims title to a portion of the demanded premises, both he and his assignees are estopped to subsequently set up against the demandant, or his assignees, any claim which the tenant may have had at the time of the disclaimer. *Hamilton v. Elliott*, 408.
 6. **THE ESTOPPEL IS NOT SET AT LARGE** by a subsequent agreement of the demandant to purchase all the tenant's right, title and interest. *Id.*
 7. **TENANT IS BOUND BY AN ESTOPPEL** on his landlord existing before the tenant's title is derived. *Bufferlow v. Newsom*, 565.
 8. **WIDOW IS ESTOPPED BY HER HUSBAND'S DEED**, where she succeeds to his possession without any allotment of dower, she being tenant to the heir who is estopped. *Id.*
 9. **ESTOPPEL IN PAIS BINDING A HUSBAND** binds his widow also with respect to land of which she succeeds to his possession. *Id.*
 10. **ESTOPPEL IS BINDING UPON THE JURY** where it has been waived by the party in pleading, and a finding contrary thereto may be disregarded by the court. *Id.*

EVIDENCE.

1. **DECLARATIONS OF A PARTY, WHEN ADMISSIBLE.**—The declarations of a husband, made pending an action for slander of his wife, that he believed defendant had not originated the slander, but only repeated the same, are admissible in mitigation of damages. *Evans v. Smith*, 74.
2. **COMPROMISES, NEGOTIATIONS FOR, WHEN EVIDENCE.**—Statements of facts made in negotiations for compromises are admissible as evidence. *Id.*
3. **IMPEACHMENT OF A WITNESS.**—Evidence of the general moral character of a witness is admissible for the purpose of impeachment, but evidence of particular instances of moral turpitude is not. *Id.*
4. **CREDIT OF A WITNESS** must be impeached or sustained by evidence of his general character, and not of his conduct in particular cases. *Allen v. Young*, 130.
5. **DEPOSITIONS ADMITTED IN EVIDENCE BY STIPULATION** of a party to the suit, who is afterwards appointed the agent of another party to manage such suit, and whose prior acts were ratified and adopted by such other party, may be read in evidence against the latter. *Blight's Heirs v. Banks*, 136.
6. **UPON A QUESTION OF DOMICILE**, the declarations of the party whose home is in controversy, made at the time of his going or returning, may be received as evidence of his intention. *Gorham v. Canton*, 231.
7. **A WRITTEN INSTRUMENT**, purporting to be a deed of partition, and signed by the parties, but not sealed, is not so far a nullity as to admit parol evidence to contradict it. *Gardiner Mfg. Co. v. Heald*, 248.

8. **CONFIDENTIAL COMMUNICATIONS** to a solicitor are privileged, and can not be revealed even after the termination of the suit. *Chase's case*, 277.
9. **OBLIGATION OF SECRECY** is the client's privilege, and if waived by him, does not render the solicitor an incompetent witness. *Id.*
10. **ONE WHO PARTS WITH ALL HIS INTEREST** in the subject-matter of a conditional sale is a competent witness for the plaintiff in an action of replevin by his co-vendor against attaching creditors of the vendee. *Smith v. Dennie*, 368.
11. **IF A SUBSCRIBING WITNESS** to an instrument deny his signature, it may be proved by other testimony. *Patterson v. Tucker*, 472.
12. **MORTGAGOR IS NOT A COMPETENT WITNESS** for the mortgagee, in an ejectment brought against one to whom the mortgagor has quitclaimed the land. *Jackson v. McChesney*, 521.
13. **NOTICE TO PRODUCE A PAPER** at the trial is not sufficient to let in parol proof, unless served on the attorney before the term, where the paper is at the party's residence at a distance from the court. *Gorham v. Gale*, 549.
14. **CREDIBILITY OF EVIDENCE**, whether oral or written, is a matter for the jury to decide. *Turner v. Child*, 555.
15. **HANDWRITING OF A SURVEYOR LONG DECEASED**, in a particular plat of survey, may be proved by a witness who has acquired his knowledge by examining many plats of surveys, purporting to have been made by the same surveyor. *Jones v. Hughes*, 567.
16. **ANCIENT SURVEY** of land, made under the owner's direction, and for his convenience, is not evidence for him or those claiming through him. *Id.*
17. **THE SUBSCRIBING WITNESS** must be produced to prove the execution of a writing, or his absence accounted for. *Zerby v. Wilson*, 577.
18. **BOOKS OF ACCOUNT AS EVIDENCE**.—Our act does not authorize the admission of books of account as evidence, but it recognizes the custom of admitting them as having become law. *Boyd v. Ladson*, 707.
19. **MERCHANTS, TRADERS, AND HANDICRAFTSMEN** are spoken of in the act, the provisions of which relate to shop books, merchants' accounts, and accounts for work done. *Id.*
20. **ACT HAS BEEN EXTENDED** to cases within its spirit, though not within the letter; as to millers for sawing and selling lumber, and to printers for advertising. *Id.*
21. **MECHANICS' ACCOUNTS** are admissible to prove performance of a particular job and articles furnished, but the articles must be specified, and a general charge for work and labor, it seems, is not good. *Id.*
22. **FERRYMAN'S BOOKS** have been held admissible, but this is doubtful. *Id.*
23. **BILLIARD-TABLE KEEPER'S BOOKS** are not admissible in evidence. *Id.*
24. **PEDIGREE**.—Hearsay or reputation is legal evidence upon a question of pedigree, and may be received to establish descent from Indian ancestors, and, consequently, to prove a right to freedom based on such descent. *Vaughan v. Phebe*, 770.
25. **DECLARATIONS OF DECEASED MEMBERS** of a family are admissible to prove relationship. *Id.*
26. **THE RIGHT TO FREEDOM** is a right of a public nature; and common reputation regarding the status of the person whose right thereto is disputed, or of his ancestors, is admissible as evidence in his favor. *Id.*

27. **THE COMMON REPUTATION** which is competent as evidence in cases of custom, prescription, etc., must be reputation as to the right, privilege, or franchise claimed, and not hearsay as to any particular fact from which the right might be inferred. *Id.*
28. **DECISIONS OF THE COURTS OF A STATE OR NATION** interpreting its own statutes, will not be questioned elsewhere. *Id.*
29. **PROOF OF A JUDGMENT** must be made by producing the best evidence of which the nature of the case admits. For this purpose, hearsay is inadmissible. *Id.*
30. A **JUDGMENT** between other parties may be admitted in those cases where hearsay evidence of the facts upon which the judgment is grounded would be unobjectionable. Therefore, in an action involving the plaintiff's right to freedom, the court may receive in evidence the record of a judgment between strangers to the present action, establishing the right to freedom of a maternal aunt of the plaintiff. *Id.*

See **CONTRACTS**, 1, 9.

EXECUTIONS.

1. **OMISSION OF SHERIFF** to comply with directions of the law, with respect to notice of time and place of sale, does not vitiate a sale made to an innocent purchaser; but fraud on the part of the officer, with knowledge on the part of the purchaser, will render the sale void. *Webber v. Cox*, 127.
 2. **SALE UNDER EXECUTION** against the holder of an apparent equity only, does not affect the holder of the legal title who was not a party to the suit; an equitable title can not be sold under execution. *Blight's Heirs v. Banks*, 136.
 3. **EXECUTION AGAINST AN ABSENT DEFENDANT**, sued out without filing the bond, as required by statute, can not be avoided collaterally. *Gardiner Mfg. Co. v. Heald*, 248.
 4. **THE INTEREST OF A CESTUI QUE TRUST** in lands may be taken in execution. *Pritchard v. Brown*, 431.
- See **ATTACHMENT**, 1; **SHERIFFS**, 3; **STATUTE OF FRAUDS**, 2; **SURETYSHIP**, 6.

EXECUTORS AND ADMINISTRATORS.

1. **ADMINISTRATOR DE BONIS NON** is entitled to all property of the decedent unadministered, but not to money, the proceeds of property sold by the first administrator. *Slaughter v. Froman*, 33.
2. A **COVENANT BY AN EXECUTOR** in a conveyance of the estate of the testator is binding on the executor. *Allen v. Sayward*, 221.
3. **WHERE AN EXECUTOR AUTHORIZED TO SELL LAND**, under a license of the probate court, in order to raise a specified sum, sells an entire tract for a greater sum, the sale is void. *Adams v. Morrison*, 406.
4. **AGENT DOES NOT BECOME EXECUTOR DE SON TORT** by collecting, after his principal's death, debts due on a sale made by him in the principal's lifetime; if the sale is made after the death, it is otherwise. *Turner v. Child*, 555.
5. **COLORABLE AUTHORITY TO INTERMEDDLE WITH GOODS** of a decedent does not render one executor *de son tort*. *Id.*
6. **ACT FOR WHICH THE AGENT IS LIABLE TO THE ADMINISTRATOR** does not make him executor *de son tort*. *Id.*

7. **SUB-AGENT IS EXECUTOR DE SÓN TORT, WHEN.**—A person appointed by an agent to sell the principal's goods and to collect debts due him becomes an executor *de son tort* if he continues to act after the principal's death and notice from the agent that the agency is at an end. *Id.*
8. **EXECUTOR DE SON TORT CAN NOT RETAIN** for his own debt. *Id.*
9. **PREVIOUS TO 1795 THERE WAS NO LAW** in the territory northwest of the Ohio, making real property assets in the hands of administrators for the payment of debts. *Ludlow v. Johnson*, 609.
10. **THE LAW OF 1795** was not repealed by the act of 1804, defining the duties of executors, but was repealed by the act of February 22, 1805. *Id.*
11. **EXECUTOR DE SON TORT.**—Any intermeddling with the estate of a decedent, as by collecting money, paying debts, or the like, renders one executor *de son tort*. *Givens v. Higgins*, 742.
12. **DOCTRINE OF THE EARLY CASES** was more stringent than that now held. *Id.*
13. **INTERMEDDLING MUST BE SUCH** as to manifest a right to control or dispose of the effects of the deceased. *Id.*
14. **ACTING AS SERVANT** to another will not make one liable as executor *de son tort*. *Id.*
15. **WIDOW'S OVERSEER OR AGENT** collecting or disbursing funds of the estate, as such, does not become executor *de son tort* of the deceased husband. *Id.*

See **CONFLICT OF LAWS**, 2; **PLEADING AND PRACTICE**, 3; **POWERS**; **SURETSHIP**, 1.

FEES.

See **TRUSTS AND TRUSTEES**, 13, 14.

FEMES COVERT.

See **ACKNOWLEDGMENTS**; **TRUSTS AND TRUSTEES**, 5.

FIXTURES.

WHAT ARE.—A copper kettle or boiler in a brewhouse is part of the freehold, and subject to the mechanics' lien law. *Gray v. Holdship*, 680.

FORGERY.

See **CRIMINAL LAW**, 1, 2, 4, 9.

FRAUD.

FRAUD AND DECEIT BY ONE WHO IS TRUSTED are most odious in law. *Owings case*, 311.

See **CONCEALMENT**, 1, 2; **CONSIDERATION**; **DEEDS**, 17; **MENTAL UNSOUNDNESS**, 1, 3, 11.

FRAUDULENT CONVEYANCES.

1. **A FRAUDULENT SALE MUST BE SET ASIDE** by a suit regularly brought for that purpose; until declared null it is binding upon third persons, and such sale can not be avoided in a suit to which the vendee is not a party. *Yocum v. Bullit*, 184.

2. **FRAUDULENT SALE.**—Where a father, on the verge of bankruptcy, makes a sale of his property to his infant natural son, taking the son's notes in payment, but remaining in possession until his death, such sale will be adjudged fraudulent and void as to the heirs and creditors of the deceased; and the notes will be considered null and void as regards the drawer and his heirs. *Beale v. Delancy*, 199.
3. **A CONVEYANCE FROM FATHER TO SON** of the former's farm in consideration of the son's bond to support his father during life is good in the absence of actual fraud, the father retaining personal property to a greater amount than his debts; notwithstanding some of the personalty is exempt from execution, and that after his decease his estate becomes insolvent in consequence of the expenses of administration. *Usher v. Hazeltine*, 253.
4. **SUBSEQUENT CREDITOR, WHO IS.**—A creditor who blends in one suit debts accruing before and after a conveyance alleged to be fraudulent, and who recovers a judgment for the whole demand, will be regarded as a subsequent creditor. *Id.*
5. **A TRUSTEE PROCESS TO CHARGE ONE FOR LANDS** alleged to be conveyed by the principal defendant in fraud of creditors, does not lie. *Ripley v. Severance*, 397.
6. **WHERE, TO DEFRAUD CREDITORS,** a debtor transfers goods to one who *bona fide* pays, or assumes to pay, on account of the goods, debts to the full value of such goods, the transferee can not afterwards be charged as the trustee of the debtor. *Hutchins v. Sprague*, 439.
7. **STATUTES OF 13 AND 27 ELIZ.** against fraudulent conveyances are merely declaratory of the common law. *Hudnal v. Wilder*, 744.
8. **THE INTENT WITH WHICH A DEED IS MADE,** and not the act of voluntarily conveying, renders it void. *Id.*
9. **VOLUNTARY DISPOSITION OF ARTICLES OF NECESSITY** in habitual use, such as household furniture, provisions, and the like, will inevitably excite a suspicion of fraud. *Id.*
10. **VOLUNTARY DEED BY ONE LARGELY INDEBTED** is void against existing creditors, as a conclusion of law. *Id.*
11. **VOLUNTARY DEED IS FRAUDULENT AGAINST A SUBSEQUENT PURCHASER,** if intended to secure the property from the reach of creditors. *Id.*
12. **BETWEEN THE PARTIES** a voluntary deed is always good. *Id.*
13. **PAYMENT OF DEBTS WILL CURE A DEED** fraudulent against creditors; but it will not affect the rights of a subsequent purchaser if the circumstances authorize a belief that no change of property was actually intended, but that the property was to revert to the donor when the debts were paid. *Id.*
14. **ENGLISH DECISIONS UNDER 27 ELIZ.** hold that a subsequent *bona fide* purchaser, even with notice, shall prevail against a prior voluntary donee. *Id.*
15. **IN CASES OF PERSONALTY AS WELL AS REALTY** a *bona fide* sale without notice must prevail against a prior voluntary deed. *Id.*
16. **VENDOR IN POSSESSION** is considered the owner as to creditors and subsequent purchasers against the most solemn conveyance to a *bona fide* purchaser not in possession. *Id.*
17. **PURCHASER FROM A TRUSTEE** without notice, holds the property discharged of the trust. *Id.*

18. **PRESUMPTION OF FRAUD FROM THE DONOR'S POSSESSION** under a trust deed, made as a provision for one of the family, may be repelled, where the property and its proceeds are kept for the donee's separate use and benefit; but not so where the donor uses it as his own, and for his own benefit, and the gift is evidenced only by parol, or by a deed in the donor's possession. *Id.*
19. **IF A VOLUNTARY GIFT BE ACTUALLY FRAUDULENT**, notice to the subsequent purchaser can not do away the fraud. *Id.*
20. **PURCHASER WITH NOTICE OF A VOLUNTARY DEED** in favor of one of the donor's family can not be relieved. *Id.*

See MORTGAGES, 1, 2.

GRAVESTONES.

See ACTIONS, 1.

GUARANTY.

See STATUTE OF FRAUDS, 3, 4.

HIGHWAYS.

NO MAN IS BOUND TO FENCE against cattle on the highway unless they are rightfully there. Cattle which escape from one man's land, through defects in his fence, upon the highway, and enter upon another's land through defects in his fence, were not rightfully on the highway. *Mills v. Stark*, 444.

See EASEMENTS AND SERVITUDES, 2.

HOMICIDE.

See CRIMINAL LAW, 12, 13, 14, 23.

HUSBAND AND WIFE.

1. **AT LAW, HUSBAND AND WIFE** are treated as one person, yet equity frequently treats them as different. *Elliott v. Waring*, 69.
2. **WIFE'S ESTATE—WHEN APPLIED TO HUSBAND'S DEBTS.**—Equity will provide a sufficient maintenance for a wife and her children out of property descending to her during coverture from her father, before requiring such property to be applied to the satisfaction of the claims of her husband's creditors. *Id.*
3. **SEPARATE ESTATE OF WIFE, WHAT IS.**—Property acquired by a wife, while deserted by her husband, is her separate estate, and she may dispose of it by will or otherwise. *Starrett v. Wynn*, 654.

See ESTOPPEL, 7, 8.

IDIOCY.

See MENTAL UNSOUNDNESS, 6.

INDICTMENTS.

See CRIMINAL LAW.

INFANCY.

1. **INFANT'S CONTRACTS** are not void, but only voidable at his election. *Willard v. Stone*, 496.

2. INFANT'S CONTRACTS are either void or voidable. *Cheshire v. Barrett*, 735.
 3. VOIDABLE CONTRACTS of an infant impose a qualified obligation, and their performance will be enforced if the infant, after attaining his majority, elects to be bound thereby. *Id.*
 4. SLIGHT CIRCUMSTANCES DEMONSTRATING AN INFANT'S ASSENT to a contract after coming of age will bind him. *Id.*
 5. INFANT'S CONTINUANCE IN POSSESSION of land purchased or leased, after attaining his majority, will confirm the contract. *Id.*
 6. ANY WORD OR ACTION from which assent may fairly be deduced will be regarded as confirmation. *Id.*
 7. RETAINING AND USING A HORSE purchased during infancy, after attaining majority, affirms the purchase. *Id.*
 8. INFANT'S NOTE PAYABLE TO BEARER, given as the consideration for a purchase which has been confirmed on coming of age, will support an action by the bearer, for the confirmation extends to the entire contract. *Id.*
 9. INFANT IS LIABLE IN CASE FOR EMBEZZLEMENT of goods intrusted to him, if he has attained the age of discretion. *Peigne v. Sutcliffe*, 756.
- See CONFLICT OF LAWS, 1; MARRIAGE, 2; TRUSTS AND TRUSTEES, 5.

INJUNCTIONS.

1. ON MOTION TO DISSOLVE an injunction, all objections to the sufficiency of the answer will be considered. *Gibson v. Tilton*, 306.
2. IF THE ANSWER DENIES THE FACTS upon which the plaintiff's equity rests, the injunction must be dissolved. *Id.*

See CORPORATIONS, 2; TAXATION, 7, 8.

INSANITY.

See CRIMINAL LAW, 23; MENTAL UNSOUNDNESS; WILLS, 2, 7, 8, 9, 10, 11, 12, 14.

INSURANCE—MARINE.

1. INSURERS ARE DISCHARGED BY A BREACH OF A WARRANTY in the policy, whether such breach was or was not the cause of the condemnation and loss. *Goicoechea v. La. State Ins. Co.*, 175.
2. KINDS OF WARRANTIES. —Warranties in policies of insurance are of two kinds, affirmative and promissory, each being in the nature of a condition precedent, on the non-performance of which the contract becomes void. *Id.*
3. RULE THAT WRITTEN PARTS OF A POLICY CONTROL those that are printed applies only where the written and printed words so contradict each other that the one must yield to the other; where they do not, the policy must be so construed as, if possible, to give effect to every part of it. *Id.*

JUDGMENTS.

1. COLLATERAL ATTACK. —The judgment of a court of competent jurisdiction, although the same may be erroneous, is binding until reversed, and can not be collaterally assailed. *Moore v. Tanner*, 35.
2. A JUDGMENT ADMITTING A WILL to probate, although the will is forged, is conclusive until reversed, and a payment to the executor of a debt due

- the deceased, will discharge the same, although the probate was afterwards revoked. *Id.*
3. **FRAUDULENT JUDGMENT—WHO MAY ATTACK.**—In an action by a creditor, to set aside a deed as fraudulent, the grantee therein may show, although his deed is fraudulent as to creditors, that the complainant's judgment was obtained by fraud and artifice practiced by him upon the grantor. *Faris v. Durham*, 77.
 4. **EJECTMENT—EFFECT OF JUDGMENT IN.**—A prior judgment is not conclusive as to the title in a subsequent action of ejectment; nor in an action of trespass brought by a party in possession against a party entering upon the land by virtue of a writ of *habere facias* issued on the judgment; but such a judgment is conclusive in an action for mesne profits of the land, and for all purposes necessary to effectuate the judgment. *Crockett v. Lashbrook*, 98.
 5. **EQUITY WILL NOT RELIEVE AGAINST A JUDGMENT AT LAW** upon the ground of the discovery of new evidence after the trial, where the party did not use due diligence in procuring the evidence, which was within his reach before the trial. *Taylor v. Bradshaw*, 132.
 6. **DECREE RENDERED ON INSUFFICIENT PUBLICATION** does not bind the parties thereto: and ratification of such decree pending the suit is ineffectual. *Blight's Heirs v. Banks*, 136.
 7. **FORMER JUDGMENT, WHEN NOT A BAR TO A NEW ACTION.**—When a defendant who has obtained judgment in his favor, after the rendition thereof, admits the justice of the claim sued upon, and promises to pay the same, the former judgment is no bar to an action on such new promise. *Cook v. Vimont*, 157.
 8. **FORMER JUDGMENT MAY BE GIVEN IN EVIDENCE** under a plea of non-assumpsit. *Id.*
 9. **TRANSFER OF JUDGMENT WITHOUT NOTICE.**—If the transferee of a judgment neglects to give notice of the transfer to the judgment-debtor, and the latter's property is afterwards sold by the transferror to satisfy it, the purchaser at such sale, without notice, acquires a good title thereto. *Styles v. McNeil*, 183.
 10. **JUDGMENT IN TROVER** on which execution has issued but not satisfied, is a bar to an action of trespass brought by the same plaintiff against another person for taking the same goods. *White v. Philbrick*, 214.
 11. **A PLEA OF NIL TIEL RECORD** to an action on the judgment of a sister state should conclude not to the country, but with a verification. *Hall v. Williams*, 356.
 12. **SUCH A PLEA** is the proper plea in such an action. *Id.*
 13. **WHERE THE RECORD OF SUCH JUDGMENT** states that the defendants therein had notice, or that they appeared in defense, it seems that it can not be gainsaid. But if the record does not show any service of process or any appearance in the suit, the effect of the judgment may be avoided by showing that the court had no jurisdiction of the defendant. *Id.*
 14. **WHERE THE RECORD OF SUCH JUDGMENT** shows that one of the two defendants sued in the action in the sister state was not served, and did not appear therein, the plaintiff in the action on such judgment can not amend his declaration by striking out the name of such defendant. *Id.*
 15. **UNDER NIL DEBET PLEADED** to an action of debt on a judgment of a

- sister state, the defendant, it seems, may show want of jurisdiction in the court to render the judgment. *Id.*
16. A RECITAL IN THE RECORD that the defendant appeared by his attorney may be contested. *Id.*
 17. PURCHASER UNDER A DECREE SUBSEQUENTLY REVERSED, who enters upon the lands purchased, is not liable in trespass for acts done while the decree was in force. *Dabney v. Manning*, 577.
 18. DECREE IN CHANCERY FOR THE CONVEYANCE of land, where the deed is not executed within the limited time, operates as a conveyance, subject, as between the parties, to a revesting of the title by a reversal of the decree. *Taylor v. Boyd*, 603.
 19. REVERSAL OF A DECREE in chancery, under which a purchaser in good faith, and before service of citation on error, acquired title, does not divest the title of such purchaser. *Id.*
 20. WHEN CONCLUSIVE.—Where a court of competent jurisdiction has adjudicated upon a particular matter, that matter is not open to inquiry in a subsequent action for the same cause, between the same parties, notwithstanding the defendant may have discovered new evidence not in his power at a former trial. *Killeffer v. Herr*, 658.
 21. ESTOPPEL BY, WHEN WAIVED.—If a party, relying upon a judgment, fails to specially plead the same, in actions where judgments are required to be specially pleaded, the estoppel is waived, and the jury are not precluded from inquiring into the truth of the matter: so held in an action for maintaining a nuisance, where defendant pleaded a license, and plaintiff replied no license, instead of pleading a former judgment; but in actions of debt, assumpsit, etc., where special pleadings are not required, the former judgment is conclusive without being pleaded. *Id.*
 22. SURETIES—BOUND BY JUDGMENT AGAINST PRINCIPAL, WHEN.—A judgment against a constable for official misconduct is conclusive upon his sureties as to such misconduct, and the extent of damages sustained by the plaintiff; but they may assert any defense personal to themselves. *Masser v. Strickland*, 668.

See EVIDENCE, 29, 30; PLEADING AND PRACTICE 8.

JURISDICTION.

UNDER THE ACT OF 1803, "organizing the judicial courts," the courts of common pleas had jurisdiction to order the sale of real estate of a decedent. *Ludlow v. Johnson*, 609.

JURY.

See NEW TRIALS, 3.

LANDLORD AND TENANT.

1. LANDLORD MAY DEFEND FOR TENANT.—A landlord may always be admitted to defend for his tenant, but he is not allowed to put anything else in issue but the title of the land in the tenant's possession; nor can the landlord's title to other lands be determined in such an action. *Crockett v. Lashbrook*, 98.
2. GOODS OF A JOINT LESSEE found on the demised premises may be distrained for rent, although previously assigned by him for the benefit of his creditors. *Hoskins v. Paul*, 455.

3. **EXEMPTION FROM DISTRESS.**—Unfinished cloth at a fulling mill is exempt from distress if it is the property of a stranger, but not if it belongs to the tenant himself. *Id.*
4. **RELATION OF LANDLORD AND TENANT** once established, attaches to all who succeed to the possession through or under the tenant, either immediately or remotely. *Jackson v. Harsen*, 517.
5. **PURCHASER FROM THE TENANT** entering under an absolute conveyance in fee, is deemed to enter as the lessor's tenant, though he may not have known that his grantor derived possession from the lessor. *Id.*
6. **LEASE** is a contract for the possession and profits of lands and tenements, with a recompense of rent or other income, or a conveyance to one for life, or years, or at will, with a reservation of rent or other like return. *Id.*
7. **IF NO RENT OR OTHER RETURN** is reserved on conveying an estate for life, as where a tenancy for life is created by operation of law through the omission of words of inheritance in a conveyance, the conventional relation of landlord and tenant does not exist, and the grantee is not within the principle precluding a tenant from setting up any defense against his landlord. *Id.*

See ESTOPPEL, 7.

LEASES.

See ACKNOWLEDGMENTS, 2; LANDLORD AND TENANT.

LEGACIES.

1. **SALE OF PROPERTY, GIVEN AS A LEGACY**, by the testator in his life-time, operates as an ademption of the legacy. *Singleton v. Bremar*, 699.
2. **WORDS OF PERPETUITY** or inheritance are not necessary to devise a fee. *Peyton v. Smith*, 858.
3. **DEVISE OF "MY PLANTATION"** gives a fee. *Id.*

See ATTACHMENT, 2; DOWER, 3, 5, 6, 17, 18, 19.

LICENSE.

WHEN TERMINATED.—A license to erect a dam for temporary purposes, ends by the decay of the dam, and will not authorize the erection of another dam in its place. *Hepburn v. McDowell*, 677.

LIENS.

1. **VENDOR'S LIEN.**—Where a portion of the land, subject to the vendor's lien, remains unsold in the hands of the original purchaser, that part must first be subjected to the discharge of the lien, and if it be sufficient for that purpose, the portion sold, even in the hands of a purchaser with notice, will be held free from the lien. *Blight's Heirs v. Banks*, 136.
2. **WHERE ALL LANDS SUBJECT TO A VENDOR'S LIEN** are in the same situation, the different parts sold must contribute ratably to the discharge of the lien. *Id.*
3. **LIEN FOR PURCHASE-MONEY** can not be enforced against a sub-purchaser for a valuable consideration, without notice. *Id.*
4. **TAKING PERSONAL SECURITY FOR PURCHASE-MONEY** destroys the vendor's lien. *Id.*

5. **VENDOR RETAINS NO LIEN FOR PURCHASE-MONEY** on the claim of his vendee, where, after the sale to him, the vendor asserts title in himself, and conveys the same land to another. *Id.*
6. **LANDS, BUT NOT CLAIMS TO LANDS**, will be sold by a court of equity, to discharge liens. *Id.*
7. **VENDOR'S LIEN, HOW WAIVED**.—The taking of new and distinct security for the payment of the purchase-money, waives the lien that a vendor has upon the property sold for the payment of the purchase-price. *White v. Dougherty*, 802.

See **BONA FIDE PURCHASERS**, 5.

LUNACY.

See **MENTAL UNSOUNDNESS**, 8.

MARRIAGE.

1. **COHABITATION KNOWN TO BE ADULTEROUS** in its origin, a wife being then alive, gives no rights to the guilty parties against third persons; nor does the continuance of such cohabitation after the death of the wife afford legal presumption of a subsequent marriage. *Cram v. Burnham*, 218.
2. **INFANT MAY SUE ON A BREACH OF PROMISE TO MARRY**, although if sued on such a promise his infancy would be a good defense. *Willard v. Stone*, 496.
3. **RUMORS OF IMPROPER CONDUCT BY THE PLAINTIFF**, in an action on a breach of promise to marry, are not admissible in evidence for the defendant. *Id.*
4. **PLAINTIFF'S LICENTIOUS OR IMPROPER CONDUCT** with third persons may be proved in mitigation of damages in an action for a breach of promise of marriage, whether such conduct occurred before or after the breach. *Id.*
5. **TENDER OF MARRIAGE BY THE PLAINTIFF** is unnecessary to support an action for breach of promise to marry. *Id.*
6. **REFUSAL TO MARRY** may be inferred from a total cessation of intimacy without explanation. *Id.*

See **STATUTE OF FRAUDS**, 1.

MASTER AND SERVANT.

1. **SERVANT'S CONTRACT NOT APPORTIONABLE**.—The rule of the English cases is that a servant prevented by his master's misconduct from performing his contract, is entitled to the stipulated wages for the whole time, and that, on the other hand, he is entitled to nothing if he leaves the service voluntarily. *Byrd v. Boyd*, 740.
2. **PLANTER DISCHARGING HIS OVERSEER WITHOUT CAUSE**, at a season of the year when it is impracticable to find employment, so that his whole time is lost, is liable for the overseer's wages for the whole year. *Id.*
3. **OVERSEER CAUSELESSLY ABANDONING HIS EMPLOYER**, or, by his neglect, occasioning a loss commensurate with his services, is entitled to nothing. *Id.*
4. **EMPLOYER HAVING REAPED THE FULL BENEFIT** of services rendered by his overseer, and finding it necessary and justifiable to discharge him

from circumstances unconnected with the contract, is liable for compensation for services so rendered. *Id.*

MENTAL UNSOUNDNESS.

1. **SUIT DISMISSED BY PLAINTIFF IN HER DOTAGE**, through the undue influence of the defendant, will be reinstated and directed to be conducted by her solicitors in her name, subject to the control of the court. *Owings' case*, 311.
2. **COURT MAY PROTECT A PLAINTIFF IN DOTAGE** from all personal restraint and undue influence without a writ *de lunatico inquirendo*, and may, if necessary, appoint a receiver to protect the property in litigation. *Id.*
3. **MERE WEAKNESS OF MIND**, without imposition or fraud, forms no ground for vacating a contract; but if there be any unfairness in the transaction, the mental imbecility of the party may be taken into the account to show such fraud as will annul the contract. *Id.*
4. **CONTRACT** of one wholly *non compos mentis* is utterly void. *Id.*
5. **MAXIM THAT A MAN SHALL NOT STULTIFY HIMSELF** by his own plea for the purpose of avoiding his deed, is not a part of the law of Maryland. *Id.*
6. **IDIOTCY** is the condition of one who from his birth has never had the least glimmering of reason; it is not a derangement of the mind, but a total absence of all mind. *Id.*
7. **DELIRIUM** is that state of the mind produced by bodily disease in which it acts without being directed by the power of volition, which is wholly or partially suspended, and is regarded by the law as a species of intellectual eclipse. *Id.*
8. **LUNACY** is that condition or habit of the mind in which it is directed by the will, but is wholly or partially misguided or erroneously governed; or it is an impairment of one or more of the mental faculties, accompanied by or inducing a defect in the power of comparison. *Id.*
9. **DOTAGE** is that feebleness of the mental faculties which proceeds from old age. *Id.*
10. **MENTAL IMBECILITY** is a condition approaching that of one who is *non compos mentis*, and is analogous to childishness and dotage. *Id.*
11. **CIRCUMSTANCES COUPLED WITH MENTAL WEAKNESS**, which will afford sufficient evidence of fraud to vacate a contract, considered. *Id.*
12. **DEED MADE BY ONE IN HER DOTAGE**, conveying all her property, without consideration, to her daughter, should be set aside where it does not appear ever to have been in the grantor's hands, or to have been read by or to her, but was produced from the grantee's possession and executed at a time when the grantor was suffering from an attack of disease grievously affecting her mental faculties. *Id.*
13. **DECREETING CONVEYANCE WHERE PARTY IS INCOMPETENT**.—Where a party required to make a conveyance is mentally incapable of contracting, the court in its decree may appoint a guardian to make the conveyance in such party's name. *Id.*

See WILLS, 7, 8, 9, 10, 11, 12.

MORTGAGES.

1. **MORTGAGOR'S POSSESSION OF PERSONAL PROPERTY** mortgaged is not incor-

sistent with the mortgage, and is not conclusive evidence of fraud. *Holbrook v. Baker*, 236.

2. **CHATTEL MORTGAGE TO SECURE FUTURE ADVANCES** is not invalid as to creditors, there being no suggestions of unfairness or trust between the parties. *Id.*
3. **THE RIGHT TO REDEEM A CHATTEL** mortgaged can not be seized on attachment or execution by the creditors of the mortgagor. *Id.*
4. **ABSOLUTE CONVEYANCE AND BOND TO RECONVEY** do not constitute a mortgage, unless it is clear from the contemporaneous agreements and dealings that such was the intention; and the absolute vendee having the legal title, his widow may have dower in the premises. *Chase's case*, 277.
5. **MORTGAGE NOT PAYMENT.**—A mortgage given by an indorser to secure the indorsed note, does not operate as payment, nor release him from liability, although it contain a stipulation against his personal liability. *Ainslie v. Wilson*, 532.
6. **MORTGAGE, WHAT IS.**—A deed absolute and a defeasance constitute a mortgage. *Friedley v. Hamilton*, 638.
7. **DEFEASANCE, EFFECT OF FAILURE TO RECORD.**—A deed absolute accompanied by a defeasance, will, if the defeasance is not recorded, although the deed is recorded, be treated as an unrecorded mortgage, and postponed to the lien of a subsequent judgment. *Id.*
8. **A PRIOR MORTGAGEE**, with notice of a subsequent mortgage, holds the balance of the fund derived from a sale of the mortgaged premises, over and above his mortgage, in trust for the subsequent mortgagee. *White v. Dougherty*, 802.

MUNICIPAL CORPORATIONS.

1. **BY-LAWS OF A CITY** are binding on strangers coming within the territorial limits of the city. *Vandine, Petitioner*, 351.
2. **CITY BY-LAWS PROHIBITING** a person without a license from carrying offal and house dirt through any of the streets, are not in restraint of trade, but are valid. *Id.*

MURDER.

See **CRIMINAL LAW**, 12, 13, 14, 23.

NEGOTIABLE INSTRUMENTS.

1. **GIVING FURTHER TIME** to the maker of a promissory note, in pursuance of an agreement therefor, will discharge the surety who has requested the payee to collect from the principal. *Kennebec Bank v. Tuckerman*, 209.
2. **INDORSER OF A PROMISSORY NOTE INDORSED IN BLANK** will be permitted, in an action against him by the indorsee, to show that he indorsed merely to enable the plaintiff to collect the money of the drawer; and that it was agreed, when the indorsement was made, that he was not to be liable as indorser on the note. *Johnson v. Martinus*, 464.
3. **NOTE PAYABLE AT A PARTICULAR PLACE.**—It is not necessary, in an action on a promissory note made payable at a particular place, to aver or prove presentment at that place.
4. **INDORSER IS NOT AFFECTED BY THE MAKER'S DISCHARGE** under the insolvent laws of this state, where he became chargeable on the note before such discharge, but did not pay the debt until afterwards. *Ainslie v. Wilson*, 532.

5. **FIRST INDORSER HAVING PAID A SECOND INDORSER** a part of the debt, and procured his release from liability, is not prohibited from maintaining an action against the maker, by the fact that the note was subsequently sold and indorsed to another, who executed a release to the maker. *Id.*
6. **PAYMENT BY AN INDORSER BY CONVEYING LAND**, which is received as payment, will support an action against the maker for money laid out, expended, etc. *Id.*
7. **CONSIDERATION OF A BILL IS NOT MATERIAL** to the question, whether there was due diligence in presenting it, if it appears *prima facie* to have been drawn for a lawful consideration. *Aymar v. Beers*, 538.
8. **BILL PAYABLE AT A CERTAIN PERIOD AFTER SIGHT** should be presented for acceptance in a reasonable time, to charge the drawer. *Id.*
9. **WHAT IS REASONABLE TIME IS A QUESTION OF LAW** when there is no dispute about facts. *Id.*
10. **WHERE A BILL HAS NOT BEEN NEGOTIATED**, less latitude is allowed, as to time for presentment, than where it has been put in circulation. *Id.*
11. **QUESTION OF DUE DILIGENCE AS TO PRESENTMENT** depends upon the facts of each particular case. *Id.*
12. **SICKNESS OF PAYEE**, who is to be the bearer of a bill, he being at a distance from the drawee, and disabled by such sickness from presenting it, will excuse some delay. *Id.*
13. **TWENTY-NINE DAYS AFTER DATE** do not constitute unreasonable delay in presenting a bill payable three days after sight, where the payee, being the bearer, is at a distance of three hundred miles from the drawee, and is prevented by severe illness from presenting it sooner. *Id.*
14. **UNDERSTANDING THAT PAYEE IS TO BE THE BEARER** of such a bill may be proved, for the purpose of explaining delay in presenting it. *Id.*
15. **NOTE PAYABLE IN MERCHANDISE** to bearer is not negotiable. *Rhodes v. Lindley*, 580.
16. **TO AVOID THE PAYMENT OF A NOTE**, in a suit at law, on the ground of fraud, the fraud must extend to the whole consideration. *Harlan v. Read*, 594.
17. **REMOVAL OF THE MAKER OF A NOTE**, before its maturity, into a different state from that where he resided at the time of its execution, will excuse the holder from making demand of payment. *Gist v. Lybrand*, 595.
18. **NOTICE TO AN INDORSER**, addressed to him at a city generally, where he was accustomed to pass part of his time, receiving letters and messages at a particular place therein, will support a verdict for the holder, although the indorser resided nine miles from the city, though there was no proof that the city post-office was the nearest one to his place of residence. *Id.*

See CORPORATIONS, 3, 4, 5, 6; INFANCY, 8; NEGOTIABLE INSTRUMENTS, 5.

NEW TRIALS.

1. **NEWLY DISCOVERED EVIDENCE**, cumulative in its nature, will not be ground for a new trial. *Gardner v. Mitchell*, 349.
- IDEM.**—In an action for a breach of warranty of quality of certain oil sold, where verdict was found for the plaintiff, subsequently discovered evidence of declarations of the plaintiff, that the oil was of the proper quality, is not cumulative, and where the evidence was very evenly balanced at the former trial, a new one will be granted. *Id.*

3. **AFFIDAVITS OF JURORS** that they misapprehended the instructions given by the court, can not be received in support of a motion for a new trial. *Tyler v. Stevens*, 403.

NON COMPOS MENTIS.

See **MENTAL UNSOUNDNESS**.

NOTICE.

1. **THE ACTUAL POSSESSION** by a beneficiary of lands, is notice of the trust to a purchaser. *Pritchard v. Brown*, 431.
2. **A PERSON WHO SEES ANOTHER** erecting a dam, by which he will be injured, is not bound to give him notice, if the latter knows what his rights are and obstinately proceeds in the assertion of them. *Hepburn v. McDowell*, 677.
3. **NOTICE** to one, of two or more persons, engaged in a joint act, is notice to all. *Id.*

See **BONA FIDE PURCHASERS; NEGOTIABLE INSTRUMENTS**, 18; **ORDERS**.

NUNO PRO TUNO ENTRIES.

See **PLEADING AND PRACTICE**, 22, 23.

OFFICE AND OFFICERS.

DEPUTY CLERK may be appointed by parol, and such deputy may discharge the duties of the clerk's office. *Bonds v. State*, 795.

See **TRUSTS AND TRUSTEES**, 1, 4, 13.

ORDERS.

1. **PUBLICATION OF AN ORDER FOR TWO MONTHS**, as required by statute, is sufficient, although such order directed its publication for eight weeks only. *Blight's Heirs v. Banks*, 136.
2. **AFFIDAVIT FOR ORDER OF PUBLICATION** against persons sued as unknown heirs, must be made by the complainant himself, unless it appear why he could not make it. *Id.*

See **PLEADING AND PRACTICE**, 22, 23, 24.

PARTIES.

See **PLEADING AND PRACTICE; STATUTE OF FRAUDS**, 4.

PARTNERSHIP.

1. **PARTNER'S POWER TO BIND BY DEED.**—Partners have no power to bind each other, or the firm of which they are a part, by deed. *Robinson v. Crowder*, 762.
2. **ASSIGNMENT UNDER SEAL**, of the effects of the firm, by one or more of the partners for the payment of the firm debts, binds the rest. *Id.*
3. **PARTNERSHIP PROPERTY.**—Creditors of a partnership have in equity a lien upon the partnership property, and they are entitled to have their claims satisfied out of the partnership effects, in preference to the creditors of an individual member of the firm. *White v. Dougherty*, 803.
4. **A PARTNER'S INTEREST** in partnership property is his share, after the firm debts are paid, and an individual creditor of such partner can only

acquire a lien on such interest. If the partnership is insolvent, there is no interest upon which he can acquire a lien. *Id.*

5. **PARTNERSHIP CREDITORS**, having a lien on the separate property of one of its members, must, if the firm is insolvent, exhaust his separate lien, before he comes in with other creditors for a share of the partnership effects. *Id.*

See SHIPPING, 3; STATUTE OF LIMITATIONS, 7.

PATENTS—LAND.

CONSTRUCTION OF.—A construction that gives effect to a patent is to be preferred to one that renders it inoperative and void; and, in determining what land is embraced within the calls of a patent, reference may be had to the surveyor's field notes and the original plat, if the patent itself is uncertain. *Alexander v. Lively*, 50.

PERJURY.

See CRIMINAL LAW, 18, 19.

PLEADING AND PRACTICE.

1. **PARTIES.**—On the distribution of an estate, all the distributees should be before the court. *Slaughter v. Froman*, 33.
2. **IDEM—WHO ARE NECESSARY.**—The assignor of a judgment should be made a party to a bill brought by an assignee against a husband to apply certain property to the satisfaction of the judgment; and when the property sought to be so applied is the wife's distributive share in her father's estate, she should also be a party. *Elliott v. Waring*, 69.
3. **EXECUTORS OF OBLIGEE OF A BOND FOR A CONVEYANCE OF LAND** who dies before the time fixed in the condition for the conveyance, must be parties to a bill brought for rescission on the ground of fraud on the part of the obligor in misrepresenting boundaries, and in selling land to which he had no title; or where a part of the purchase-money remains unpaid. *Rice v. Spotswood*, 115.
4. **A PARTY TO A SUIT** is not bound to disclose to his adversary facts which tend to defeat or weaken his own right of recovery; and he commits no fraud by remaining silent. *Taylor v. Bradshaw*, 132.
5. **WHERE A DEMURRER** is interposed, the bill is to be taken as true. *Id.*
6. **ON AN AGREED STATEMENT OF FACTS**, where there is no special limitation, the defendant should have judgment, if the facts would verify any plea which would be a bar to the action. *Gardiner v. Nutting*, 211.
7. **PLEA AND ANSWER TO SAME MATTER.**—Where a party pleads and answers to the same matter, the answer overrules the plea; so a demurrer is waived by a plea or answer to the same matter. *Chase's case*, 277.
8. **DECREE DISMISSING A BILL** is no bar to a subsequent suit, unless it is shown that there was an absolute determination that the party had no title, and that the matter is *res adjudicata*. *Id.*
9. **AGREEMENT TO DISMISS A SUIT** is not necessarily a relinquishment of the right. *Id.*
10. **AFFIDAVIT MADE IN ANOTHER STATE**, verifying an answer in a suit brought in this state, is not within the act of congress regulating the authentication of judicial proceedings in other states. *Gibson v. Tilton*, 306.

11. **SUCH AFFIDAVIT**, if made before a magistrate duly authorized to administer an oath by the laws of the state where it was taken, is admissible here, and is considered as having been taken under the authority of the court in which the suit is pending. *Id.*
12. **TAKING OF DEPOSITIONS AND AFFIDAVITS** in one state, in aid of judicial proceedings pending in another, rests upon a principle of comity between the states. *Id.*
13. **PARTY MAKING A FALSE AFFIDAVIT ABROAD**, for use in judicial proceedings here, can not be prosecuted criminally in this state, but a party using such affidavit, knowing its character, may be punished for practicing an imposition upon the court. *Id.*
14. **SUIT ABATED BY THE DEATH** of a party after a decree affecting both real and personal estate must be revived by or against both the heirs and personal representatives, in order to embrace the whole subject of the decree. *Owings' case*, 311.
15. **HEIRS OR PERSONAL REPRESENTATIVES** may revive and prosecute a suit thus abated after decree, to the extent of their respective interests, but no further. *Id.*
16. **SUIT MAY BE REVIVED** to recover costs taxed and allowed to a deceased plaintiff, as a liquidated and decreed debt passing to the personal representative. *Id.*
17. **AFTER APPEARANCE BY THE DEFENDANT**, the process will not be set aside, even though it be void, and though the defendant appeared in ignorance of that fact. *Pixley v. Winchell*, 525.
18. **REFUSING LEAVE TO ADD A PLEA** after the cause is at issue, is within the discretion of the court, and, therefore, not appealable. *Turner v. Child*, 556.
19. **PARTY RELYING ON AN ACCOUNT** for the purpose of claiming a credit, must accept it as a whole, though he may contradict or disprove it. *Id.*
20. **PARTY CAN NOT BE PLAINTIFF AND DEFENDANT** in the same cause. Hence, a confession of judgment by executors to a firm of which one of them is a member, is erroneous. *Pearson v. Nesbit*, 569.
21. **WRIT OF ERROR** is a proper remedy in such a case. *Id.*
22. **A NUNC PRO TUNC ENTRY** of an order made when the court's authority had ceased does not render the order valid. *Ludlow v. Johnson*, 609.
23. **A NUNC PRO TUNC ORDER** can not be founded upon mere parol proof of what was ordered to be done at a previous term. *Id.*
24. **AN ORDER OF A COURT OF COMPETENT JURISDICTION** can not be collaterally inquired into. *Id.*

See COSTS.

POWERS.

POWER GIVEN TO EXECUTOR BY WILL to sell lands, when, in his opinion, sale can be made to good advantage, and to distribute the proceeds among the testator's children as they come of age, is a power coupled with an interest, and entitles the executor to the possession of the land. *Dabney v. Manning*, 597.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PROHIBITION.

PROHIBITION TO RESTRAIN A GOVERNOR from issuing a commission to an officer because of irregularity in his election, will not lie. *Greir v. Taylor*, 731.

PUBLICATION.

See ORDERS.

REAL ESTATE.

1. **THE WORD "WITHDRAWN,"** found on the margin of a surveyor's entry book, does not prove that the entry was withdrawn. *Mills v. Lee*, 118.
2. **WHERE LAND IS DESCRIBED IN A DEED** by reference to a plan, between which and the original survey there is a difference in the location of lines and monuments, the lines and monuments as actually located are to govern. *Ripley v. Berry*, 201.
3. **A LOT GRANTED FRONTING ON** and bounded by a river will extend to the river, although the side lines thereby cross a point formed by the junction of a branch with the principal river. *Graves v. Fisher*, 203.
4. **TERMS ATTENDANT UPON THE INHERITANCE** have never been introduced into this state. *Chase's case*, 277.
5. **TO ESTABLISH BOUNDARIES**, evidence of common reputation is not admissible to contradict record evidence. *McCoy v. Galloway*, 591.
6. **COURSE AND DISTANCE** must give way to natural objects. But to warrant the application of this rule the natural objects must be identified. *Id.*
7. **REMAINDER, WHEN VOID, AS REPUGNANT TO THE FIRST ESTATE GRANTED.**—A bequest to a person of certain personal property, with the power of disposal, vests the same absolutely in the first legatee, and a remainder over to another person of what remains of the property at the death of the first legatee, is repugnant to the first estate granted, and void. *Smith T. v. Bell*, 798.

RECEIVERS.

1. **FAILURE TO DENY ALLEGATIONS IN PETITION.**—A petition, pending a suit, asking for the appointment of a receiver and setting forth new facts which are material, if not denied by a written answer on oath, will be taken as true. *Chase's case*, 278.
2. **APPOINTMENT OF A RECEIVER** does not affect the title or involve a determination of it, but it can only be made on the application of one having an acknowledged interest. *Id.*
3. **MANIFEST ABUSE OF A TRUST** by an habitual and prospective course of dealing, bringing the property into danger, is sufficient ground for the appointment of a receiver. *Id.*
4. **PROPERTY OR ITS RENTS AND PROFITS** must be in danger to warrant the appointment of a receiver. *Id.*
5. **INSOLVENCY OF PARTY RECEIVING THE RENTS** and profits exposes them to danger of loss, and will be a sufficient ground to appoint a receiver. *Id.*
6. **CLAIM OF THE WHOLE TITLE** is unnecessary to authorize a party to make application for the appointment of a receiver; hence, a widow claiming dower in the premises may make the application. *Id.*

RECORDING.

RECORDING A DEED EXECUTED BY TWO, but acknowledged by one only, is, at least, presumptive evidence of notice to creditors or subsequent purchasers. And it is immaterial whether the grantors were tenants in common, or were separately seised of distinct parts. *Shaw v. Poor*, 347.

See **BONA FIDE PURCHASERS**, 5; **DEEDS**, 1, 2.

REFEREES.

AN OPINION PREVIOUSLY FORMED BY A REFEREE upon a case submitted to him is no objection to the report, if it appear that his mind was open to conviction. *Graves v. Fisher*, 203.

RENTS.

See **DOWER**, 2, 8, 12; **ESTATES OF DECEASED PERSONS**, 1; **LANDLORD AND TENANT**, 7.

RES ADJUDICATA.

See **JUDGMENTS; PLEADING AND PRACTICE**, 8.

RESCISSION OF CONTRACTS.

See **EQUITY**, 1.

RESTITUTION.

WRITS OF NOT FAVORED.—Motions for writs of restitution are not favored, unless there is no controversy as to the facts; nor will the court, on such a motion, determine doubtful questions as to boundaries, and a decision granting the writ is not conclusive of the rights of the parties. *Crockett v. Lashbrook*, 98.

SALES.

1. **A VERBAL SALE OF STANDING TREES** is not binding on a subsequent purchaser without notice. *Gardiner M'fg Co. v. Heald*, 248.
2. **A PURCHASER OF PERSONALTY WITH NOTICE** that his vendor is not to have the title to the articles until the performance of certain conditions, acquires no title as against the person on whose behalf performance was to be made, he being the owner of the articles. *Waterston v. Getchell*, 251.
3. **A VOLUNTARY DELIVERY OF GOODS** sold on condition, without any reference to the condition, and followed by no demand for the performance of the condition, until after the goods were attached by the vendee's creditors, will be a waiver of the condition as regards such creditors. *Smith v. Dennie*, 368.

SEALS.

See **CONTRACTS**, 12.

SERVITUDES.

See **EASEMENTS AND SERVITUDES**.

SHERIFFS.

1. **INDEMNITY—OFFICER WHEN ENTITLED TO.**—When a jury, called by a claimant to property seized under execution, fails to find a verdict, the

officer is not entitled to indemnity before selling, and a bond so given to indemnify him is without consideration, and void. *Mitchell v. Vance*, 96.

2. PROMISES TO OFFICERS, to induce them to perform the duty required of them by law, are void. *Id.*
3. PLAINTIFF'S ATTORNEY HAS POWER TO DIRECT THE SHERIFF as to the time and manner of enforcing execution. *Gorham v. Gale*, 549.
4. SHERIFF EXECUTING A DEED ON A SALE BY HIS DEPUTY does not become liable for money received by the deputy upon such sale, pursuant to an arrangement with the plaintiff's attorney out of the usual course, of which the sheriff is not shown to have had any knowledge. *Id.*
5. CREDIT ON SHERIFFS' SALES is unknown to the law. *Id.*
6. EITHER THE SHERIFF OR DEPUTY MAY EXECUTE A DEED on a sale on execution made by the latter. *Id.*
7. EXECUTION OF A DEED BY THE SHERIFF affirms nothing more in such a case than that the sale was made in the usual manner, and does not make him liable for any act of the deputy for which he was not before liable, particularly where the action for such act was commenced before the deed was executed. *Id.*
8. SHERIFF IS LIABLE FOR HIS DEPUTY'S ACTS only in the ordinary execution of his office; hence, he is not liable for acts performed by the deputy out of the usual course, under instructions from the plaintiff or his attorney. *Id.*
9. SURETIES OF DEPUTY ARE RESPONSIBLE only for his defaults in his official duties. *Id.*
10. WHERE THE SHERIFF HAS NO REDRESS against the deputy or his sureties, he ought not to be liable for the deputy's acts. *Id.*

See STATUTE OF LIMITATIONS, 2.

SHIPPING.

1. CONTRIBUTION FOR THE JETISON of goods laden on deck can not be enforced from the owner of the vessel. *Dodge v. Bartol*, 233.
2. WHERE A VESSEL IS CHARTERED without any limitation of time, it is an indefeasible hiring for every voyage undertaken before notice from the owner of his intention to put an end to the contract. *Cutler v. Winsor*, 385.
3. PARTNERSHIP IN SHIPPING VENTURE.—Facts held not to render a charterer and owner partners. *Id.*

SLANDER.

1. WHO LIABLE FOR.—A person who repeats slander heard from others indorses it, and is liable therefor. *Evans v. Smith*, 74.
2. LIABILITY OF COUNSEL FOR WORDS SPOKEN AT TRIAL.—Counsel are protected from liability for anything they say which is pertinent to the cause, if they are instructed by their clients to say it; but they are liable for anything spoken not pertinent to the cause, whether instructed or not. *Stackpole v. Hennen*, 187.
3. WORDS SPOKEN BY COUNSEL WHEN THE CLIENT IS PRESENT, are presumed to be authorized by him. *Id.*

SPECIFIC PERFORMANCE.

WHEN REFUSED.—A decree for a proper deed will be denied, unless it ap-

pears that a proper deed was prepared and presented to the grantor, and that he refuses to execute the same. *Morrison v. Caldwell*, 84.

STATUTES.

1. A STATUTE INFLECTING A PENALTY for the commission of an act, implies a prohibition. *Roby v. West*, 423.
2. THE REPEAL OF A STATUTE making an act illegal, does not thereby render the act valid. *Id.*
3. STATUTE EMPOWERING A COURT TO GIVE SUCH RELIEF as right and justice may appear to require, does not authorize an arbitrary determination, but a decision according to the legal rights of the parties. *Ex parte Willcocks*, 526.

See CONSTITUTIONAL LAW; CONTRACTS, 11; WILLS, 7.

STATUTE OF FRAUDS.

1. PROMISES TO MARRY are not within the statute of frauds, and need not be in writing. *Withers v. Richardson*, 44.
2. EXECUTION SALES.—It is not necessary that there should be an actual delivery, and change of possession of personal property sold under execution to render the sale valid; the publicity of the sale dispenses with the necessity of a delivery. *Greathouse v. Brown*, 67.
3. A PROMISE TO ANSWER FOR THE DEBT OF ANOTHER, founded on a consideration, moving between the newly contracting parties, is not within the statute of frauds, and need not be in writing. *Dearborn v. Parks*, 206.
4. PROPER PARTIES, WHO ARE.—If one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it. *Id.*

See AGENCY, 2.

STATUTE OF LIMITATIONS.

1. MONEY PAYABLE IMMEDIATELY is not embraced within the scope of a statute which provides that money payable by the year, or at shorter periods, shall be prescribed by the lapse of five years. *Tremoulet v. Cenas*, 195.
2. SHERIFF CAN NOT PLEAD THE STATUTE OF LIMITATIONS, as to money received on an execution, which he is bound to pay immediately. *Id.*
3. PRESUMPTION OF PAYMENT does not arise from the failure of the claimant to include the debt in the schedule filed by him on a cession of his goods when he was ignorant of his rights at the time the schedule was made. *Id.*
4. AN ACKNOWLEDGMENT OR NEW PROMISE, by the maker of a promissory note, does not affect the right of collateral parties. *Gardiner v. Nutting*, 211.
5. THE ALLOWANCE OF A NOTE as a claim against the estate of a deceased insolvent, by a guarantor of the note appointed commissioner of the estate, can not be construed an acknowledgment by him, so as to stop the running of the statute as against him. *Id.*
6. IF ONE OF THE PARTIES to a writ of error is within the saving clause of the statute of limitations, the case is saved for all the parties. *Wilkins v. Philips*, 579.

7. **THE ACKNOWLEDGMENT BY ONE PARTNER** of a partnership debt, after the dissolution of the partnership, does not deprive the other partner of the benefit of the statute of limitations. *Levy v. Cadet*, 650.
8. **COURTS OF EQUITY, ACTING BY ANALOGY**, will, in all proceedings where they have concurrent jurisdiction with courts of law, apply statutes of limitations, and refuse to grant relief when it appears that the statutory period upon which an action might have been maintained at law has elapsed. *Cocke v. McGinnis*, 809.
9. **CONSTRUCTION OF.**—General words in a statute of limitations must receive a general construction, and if there be no express exception, the court can make none. *Id.*

See ADVERSE POSSESSION; DOWER, 15.

SURETYSHIP.

1. **SURETIES, LIABILITY OF.**—Sureties on a joint bond of two persons as administrators, are not liable to one of the administrators for property of the estate converted by the other. *Slaughter v. Froman*, 33.
2. **A SURETY RECEIVING FROM HIS PRINCIPAL** as security property to which the latter subsequently releases to the former all right and interest for a grossly inadequate consideration, is entitled to deduct from the value of the property all sums expended under the original contract, and other *bona fide* payments, on behalf of the principal, but must account to the latter's creditors for the residue. *Ripley v. Severance*, 397.
3. **WHERE THE PRINCIPAL ENGAGED TO PAY AN ANNUITY**, the surety was permitted to compute the value of such annuity in ready money, and retain that sum out of the property placed in his hands. *Id.*
4. **SAME.**—If the parties all concerned agree, the plaintiff may relieve the surety, summoned as trustee, from his future liability in respect to such annuity. *Id.*
5. **ONE WHO SIGNS A PROMISSORY NOTE AS SURETY**, although it does not so appear from the face of the paper, may establish the fact by parol evidence, as against one having notice; but such surety will be treated as a principal with respect to those who have no notice of his real character. *Grafton Bank v. Kent*, 414.
6. **ON AN EXECUTION AGAINST A PRINCIPAL AND SURETY**, the release of property of the principal seized will discharge the surety. *Dixon v. Ewing*, 590.

See JUDGMENTS, 22.

TAXATION.

1. **TAX SALES OF CERTAIN SPECIFIED QUANTITIES OF LAND**, supposed to embrace the whole tract, will not support a conveyance of the entire tract which subsequently turns out to be of greater extent. *Blight's Heirs v. Banks*, 136.
2. **TAX SALE OF LAND** on which no taxes were due conveys no title. *Id.*
3. **THE RECORD MADE BY THE OFFICER** of the quantity of land sold by him for taxes prevails over the certificate given to the purchaser. *Id.*
4. **THE QUANTITY CERTIFIED BY THE OFFICER** to have been sold by him is *prima facie* correct. *Id.*
5. **RECITALS IN A TAX DEED** showing that the various steps required by statute preparatory to a sale were duly taken, as, for instance, that the

- tax was first demanded at the dwelling-house of the person assessed, are not even *prima facie* evidence of that fact. *Jackson v. Shepard*, 502.
6. WHERE A SPECIAL STATUTORY POWER is given to sell land for taxes in particular cases, a purchaser at such sale must show that every prerequisite to the exercise of that power was performed. *Id.*
 7. INJUNCTION TO STAY TAX SALE of city lots, assessed by the city council of Cincinnati, will lie. *Burnet v. Cincinnati*, 582.
 8. INJUNCTION AGAINST COLLECTING A TAX assessed in the ordinary way, and unaccompanied by any circumstances of peculiar injury, will not lie, although the act authorizing the tax be unconstitutional. *McCoy v. Chillicothe*, 607.

THEFT.

See CRIMINAL LAW, 10, 20.

TORTS.

ONE MAY WAIVE THE TORT and sue on the implied contract only in those cases where the defendant has derived some benefit from the tort. *Webster v. Drinkwater*, 238.

TRESPASS.

LIBERUM TENEMENTUM is a sufficient plea in justification, in an action of trespass *quare clausum fregit*. *Crockett v. Lashbrook*, 98.

See ACTIONS, 1; JUDGMENTS, 17.

TROVER.

CONVERSION.—A person may be guilty of a conversion without having the actual possession of the property. *Hall v. Amos*, 42.

TRUSTS AND TRUSTEES.

1. TRUSTEES AS MINISTERIAL OFFICERS OF COURT.—It has long been the practice in this state for the court of chancery to appoint trustees as its ministerial officers to carry into effect its decrees and orders, particularly in creditors' suits. *Gibson's case*, 257.
2. FUNCTIONS of such trustees are, in some respects, strictly analogous to those of the executive officers of courts of law, and are somewhat, though not entirely, similar to those of masters in chancery in England. *Id.*
3. WOMEN MAY BE APPOINTED as executive trustees of the court, where it will promote the interests of all concerned; as where a committee is selected to take charge of the person of a female lunatic, or of a lunatic husband, father, etc. *Id.*
4. OFFICERS WHOSE DUTIES ARE INCOMPATIBLE with the duties of trustees, such as register, clerk, or judge of a court, can not be employed as trustees. *Id.*
5. INFANTS AND FEMES-COVERT, being incompetent to contract, can not act as trustees for the sale or disposition of property where security is required to be given. *Id.*
6. TRUSTEE MUST BE A CITIZEN AND RESIDENT within the jurisdiction of the court, so as to be continually under its control, and to be the better able to discharge the trust; hence, no person can act as such who is in a position subjecting him to the necessity of occasional absence from the state for long intervals. *Id.*

7. COURT MAY DISPLACE A TRUSTEE where he removes from the state, or neglects his duty, or is guilty of injurious or improper conduct. *Id.*
8. COURT EXERCISES A SOUND DISCRETION in selecting trustees, paying due regard to the recommendations of the parties. *Id.*
9. PLAINTIFF'S SOLICITOR is usually appointed where the parties are silent. *Id.*
10. PLURALITY OF TRUSTEES are never appointed, except on special application. *Id.*
11. TRUSTEE HAS A LARGER DISCRETION in making sales of property, as to the terms and mode of sale, than is allowed to a master in chancery in England. *Id.*
12. TRUSTEE CAN NOT, OF HIMSELF, DO ANY ACT not specified in the order or decree, but which is usually required of such trustees in similar cases; thus, in a creditor's suit, the trustee can not, without being so directed in the decree, give notice to creditors to file vouchers of their claims by a specified day. *Id.*
13. OFFICERS' FEES AT COMMON LAW.—Public officers were not permitted at common law to take any fees, except such as were expressly allowed them. *Id.*
14. COMMISSIONS OR POUNDAGE FEES are allowed trustees in making sales, both by law and the rules of the court. *Id.*
15. TRUSTEE'S COMMISSIONS are allowed as compensation for the risk and trouble involved in making a sale and disposing of the proceeds according to the decree, and are, therefore, proportioned to such risk and trouble as well as to his skill and diligence, and not exactly to the value of the subject of litigation. *Id.*
16. TRUSTEE MAY EMPLOY AN AUCTIONEER to whom a fee may be allowed for making a sale.
17. TRUSTEE'S COMPENSATION may be increased, diminished, or withheld altogether, according to the circumstances of each case, in the sound discretion of the court. *Id.*
18. TO PREVENT DOUBLE COMMISSIONS, as where a trustee dies after partly executing his trust, and another is appointed, the compensation should, if possible, be apportioned between them, according to the labor, trouble, and deserts of each. *Id.*
19. WHERE A DECEASED TRUSTEE HAS RECEIVED full commissions his successor should be allowed no more than a necessary recompense for his trouble. *Id.*
20. HALF COMMISSIONS MAY BE ALLOWED to the second trustee in such a case on the amount collected by him. *Id.*
21. A RESULTING TRUST may be shown by parol evidence. *Pritchard v. Brown.*
22. CONSIDERATION EXPRESSED to be paid by the grantee does not exclude evidence that the money belonged to a third person. *Id.*

See ESTOPPEL, 2; EXECUTIONS, 4; FRAUD; USES.

USES.

1. STATUTE OF USES.—The statute of 43 Eliz., c. 4, of charitable uses, is not in force in Pennsylvania, but the principles of it, as applied by the English chancery courts, obtain thereby force of the common law of that state. *Witman v. Lex*, 644.

2. CHARITABLE BEQUESTS, WHEN VALID.—A bequest to a church, to be annually laid out in bread for the poor, is valid. Also a bequest to trustees to invest the same and apply the interest towards the education of young students. *Id.*

See TRUSTS AND TRUSTEES.

VENDOR AND VENDEE.

1. VENDEE'S DUTY TO DEMAND DEED.—To sustain an action by the purchaser on a contract to convey, it is necessary to demand a deed of the vendor, and after waiting a reasonable time, to call on him and offer to receive it. *Fuller v. Williams*, 498.
2. IN CASE OF THE VENDOR'S DEATH, before such demand it must be made in like manner of the heirs to enable the vendee to sue the personal representative on the contract. *Id.*
3. THAT THE HEIRS ARE NUMEROUS and widely dispersed does not dispense with demand upon them. *Id.*
4. DEMAND UPON THE ADMINISTRATOR is nugatory, as he has no control of the land. *Id.*
5. ASSUMPSIT —MAY BE MAINTAINED, WHEN.—An agreement by a vendee that he will pay a mortgage existing on the land purchased is binding, if such mortgage forms a part of the price of the land; and if the vendor subsequently pays the same, by virtue of his personal liability, assumpsit for money had and received lies; but it must appear that the money has been actually paid. *Kearney v. Tanner*, 648.

VERDICT.

1. VERDICT BASED EXCLUSIVELY UPON THE TESTIMONY of an infamous witness should be set aside. *Allen v. Young*, 130.

VOLUNTARY CONVEYANCES.

See FRAUDULENT CONVEYANCES.

WAY.

See EASEMENTS AND SERVITUDES, 1, 2, 3.

WILLS.

1. WILL, ATTESTATION OF.—An attestation in the same room with the testatrix is a sufficient subscription in her presence. *Howard's Will*, 60.
2. THE TESTIMONY OF THE SUBSCRIBING WITNESSES to a will is not conclusive as to the sanity or insanity of the testator. *Id.*
3. WILL OF CONVICTED FELON.—Under the common law, all the property of a felon after conviction was forfeited to the state, but by the constitution of Kentucky such forfeiture is only for the life of the offender; and, therefore a convicted felon may dispose by will of all the reversionary interest in his property. *Rankin v. Rankin*, 161.
4. WHERE THE PAYEE OF A NOTE wrote upon the back, "If I am not living at the time this note is paid, I order the contents to be paid to A. H.," and, having signed it, died before the note was paid, it was held that the indorsement was testamentary, and entitled to probate as a will. *Hunt v. Hunt*, 438.

5. GIFT OF LAND, to take effect after the death of the donor, has all the properties of a will. *Singleton v. Bremar*, 699.
6. WILL OF PERSONALTY EXISTS ONLY FROM THE DEATH of the testator, and must be executed according to the laws in force at that time. *Elcock's Will*, 703.
7. AMENDMENT OF THE STATUTE AFTER THE EXECUTION OF A WILL of personality, and before the testator's death, relating to the number of attesting witnesses required, applies to such will, and renders it void if it is not attested by the specified number. *Id.*
8. ECCENTRICITY alone will not invalidate a will. *Lee v. Lee*, 722.
9. SANITY IS PRESUMED until the contrary is clearly proved. *Id.*
10. BELIEF THAT ONE IS TORMENTED by witches, devils, or evil spirits, is not sufficient evidence of insanity, when the person is otherwise capable of managing his business, particularly when it appears that he was most troubled with these hallucinations when he was drinking. *Id.*
11. AVESION TO RELATIONS is not evidence of insanity where ill treatment is assigned as a reason for it, and there are grounds for believing it well founded. *Id.*
12. To INVALIDATE A WILL there must be extrinsic proof of insanity existing at its execution, or the act must be so irrational as to afford intrinsic evidence of it. *Id.*
13. WHERE INSANITY HAS BECOME HABITUAL, all the civil acts of the lunatic are void, whether traceable to his malady or not. *Id.*
14. IF AN INTERMISSION OF THE MALADY is shown at the time of performing an act the act is valid, and the habitual insanity of the party will not affect it. *Id.*
15. UNJUST WILL is not necessarily an irrational act. *Id.*
16. NUMBER, CHARACTER, AND INTELLIGENCE OF WITNESSES, and their opportunities for observation, should be taken into the account upon a question of insanity. *Id.*

See LEGACIES.

WITNESSES.

See EVIDENCE, 3, 4, 10, 12; WILLS, 14.

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